(16)

No. 06-341
Title: BCI Coca-Cola Bottling Company of Los Angeles, Petitioner
v.
Equal Employment Opportunity Commission
Docketed: September 8, 2006
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (04-2220)
Decision Date: June 7, 2006
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Sep 5 2006	Petition for a writ of certiorari filed. (Response due October 10, 2006)
Oct 4 2006	Order extending time to file response to petition to and including November 9, 2006.
Nov 3 2006	Order further extending time to file response to petition to and including December 8, 2006.
Dec 8 2006	Brief of respondent Equal Employment Opportunity Commission in opposition filed.
Dec 18 2006	Reply of petitioner BCI Coca-Cola Bottling Company of Los Angeles filed.
Dec 20 2006	DISTRIBUTED for Conference of January 5, 2007.
Jan 5 2007	Petition GRANTED.
Feb 5 2007	SET FOR ARGUMENT ON Wednesday, April 18, 2007.
Feb 20 2007	Record received from U.S.C.A. for 10th Circuit. (1 box)
Feb 20 2007	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Feb 20 2007	Brief amicus curiae of National School Boards Association filed.
Feb 20 2007	Joint appendix filed.
Feb 20 2007	Brief of petitioner BCI Coca-Cola Bottling Company of Los Angeles filed.
Feb 20 2007	Brief amicus curiae of Society for Human Resource Management filed.
Feb 20 2007	Brief amicus curiae of Food Marketing Institute filed.
Feb 20 2007	Brief amicus curiae of Equal Employment Advisory Council filed.
Mar 2 2007	CIRCULATED.
Mar 12 2007	Record received from U.S.D.C. for District of New Mexico. (1 box)
Mar 20 2007	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Mar 27 2007	Brief of respondent Equal Employment Opportunity Commission filed. (Distributed).
Mar 27 2007	Brief amicus curiae of American Association of Justice filed. (Distributed)
Mar 27 2007	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed. (Distributed)
Mar 27 2007	Brief amici curiae of National Employment Lawyers Association, et al. filed. (Distributed)
Apr 9 2007	Reply of petitioner BCI Coca-Cola Bottling Company of Los Angeles filed. (Distributed)
Apr 12 2007	Motion to dismiss the writ of certiorari pursuant to Rule 46 filed.
Apr 12 2007	Letter from Solicitor General received.
Apr 12 2007	Dismissed - Rule 46.

(1)
06-341 SEP 5 - 2006

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

ERIC TODD PRESNELL
Counsel of Record
KARA E. SHEA
MILLER & MARTIN PLLC
1200 ONE NASHVILLE PLACE
150 FOURTH AVENUE NORTH
NASHVILLE, TENNESSEE 37219
(615) 244-9270

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

Question Presented For Review

Under what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, where the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee.

Parties to the Proceedings

The parties to this proceeding include the Equal Employment Opportunity Commission ("EEOC"), a governmental agency, and BCI Coca-Cola Bottling Company of Los Angeles ("BCI"), a non-governmental corporation.

Rule 29.6 Statement

BCI Coca-Cola Bottling Company of Los Angeles is a wholly owned subsidiary of Coca-Cola Enterprises Inc., a publicly traded company. The Coca-Cola Company, a publicly traded company, owns ten percent (10%) or more of the stock of Coca-Cola Enterprises Inc.

TABLE OF CONTENTS

Question Presented for Review I

Parties to the Proceeding ii

Rule 29.6 Statement iii

Table of Contents iv

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 2

I. Background Facts and Issues 2

II. Decision of the District Court 4

III. Decision of the Tenth Circuit 5

Reasons for Granting the Petition 6

I. The Circuits Are Split 6

A. There is an Acknowledged Split Among the Tenth/Seventh, Fifth, and Fourth Circuit Courts of Appeal With Respect to Subordinate Bias Liability 8

B. The Tenth and Fourth Circuit Courts of Appeal are in Conflict over the Proper Application of *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), in the Area of Subordinate Bias Liability 12

C. Other Circuit Courts of Appeal Apply Different Standards of Subordinate Bias Liability 14

II. This Case Is an Excellent Vehicle to Resolve an Important Question of Federal Law 18

Conclusion 21

Appendix

Appendix A - *Equal Employment Opportunity Commission v. BCI Coca-Cola Bottling Company of Los Angeles*, 450 F.3d 476 (10th Cir. 2006) 1a

Appendix B - *Equal Employment Opportunity Commission v. BCI Coca-Cola Bottling Company of Los Angeles*, 2004 WL 3426757 (D.N.M. June 10, 2004) 32a

TABLE OF AUTHORITIES

Cases

Abramson v. William Paterson Coll. of New Jersey,
260 F.3d 265 (3d Cir. 2001) 7, 17

Argo v. Blue Cross & Blue Shield of Kansas, Inc.,
452 F.3d 1193 (10th Cir. 2006) 19

Beason v. United Tech. Corp.,
337 F.3d 271 (2d Cir. 2003) 20

Bender v. Hecht's Dep't Stores,
455 F.3d 612 (6th Cir. 2006) 19

Bergene v. Salt River Project Agric. Improvement & Power Dist.,
272 F.3d 1136 (9th Cir. 2001) 7, 16

Burlington Industries, Inc. v. Ellerth,
524 U.S. 742 (1998) 13

Christian v. Wal-Mart Stores, Inc.,
252 F.3d 862 (6th Cir. 2001) 7, 16, 20

Dey v. Colt Constr. & Dev. Co.,
28 F.3d 1446 (7th Cir. 1994) 9

Eiland v. Trinity Hosp.,
150 F.3d 747 (7th Cir. 1998) 7

English v. Colorado Dep't of Corr.,
248 F.3d 1002 (10th Cir. 2001) 5, 7, 15

Ercegovich v. Goodyear Tire & Rubber Co.,
154 F.3d 344 (6th Cir. 1998) 7, 15, 16

Gee v. Principi,
289 F.3d 342 (5th Cir. 2002) 7

Griffin v. Washington Convention Ctr.,
142 F.3d 1308 (D.C. Cir. 1998) 7, 17

Hill v. Lockheed Martin Logistics Mgmt., Inc.,
354 F.3d 277 (4th Cir. 2004) . . . . . *passim*

Holcomb v. Powell,
433 F.3d 889 (D.C. Cir. 2006) 19

Kendrick v. Penske Transp. Servs., Inc.,
220 F.3d 1220 (10th Cir. 2000) 7

Kientzy v. McDonnell Douglas Corp.,
990 F.2d 1051 (8th Cir. 1993) 16

LaBove v. Raftery,
802 So. 2d 566 (La. 2002) 20

Laxton v. Gap, Inc.,
333 F.3d 572 (5th Cir. 2003) 11

Llampallas v. Mini-Circuits, Lab, Inc.,
163 F.3d 1236 (11th Cir. 1998) 7, 17

Long v. Eastfield Coll.,
88 F.3d 300 (5th Cir. 1996) 7

Lust v. Sealy, Inc.,
383 F.3d 580 (7th Cir. 2004) 8, 10, 11, 17

Millbrook v. IBP, Inc.,
280 F.3d 1169 (7th Cir. 2002) 19

Ocana v. American Furniture Co.,
91 P.3d 58 (N.M. 2004) 20

Pippin v. Burlington Res. Oil & Gas Co.,
440 F.3d 1186 (10th Cir. 2006) 19

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) 12, 13, 14, 18

Rios v. Rossotti,
252 F.3d 375 (5th Cir. 2001) 7

Rose v. New York City Bd. of Educ.,
257 F.3d 156 (2d Cir. 2001) 7

Russell v. McKinney Hosp. Venture,
235 F.3d 219 (5th Cir. 2000) 7, 8, 15, 17, 18

Santiago-Ramos v. Centennial P.R. Wireless Corp.,
217 F.3d 46 (1st Cir. 2000) 15, 16

Shager v. Upjohn Co.,
913 F.2d 398 (7th Cir. 1990) 4, 6, 11

Simms v. Oklahoma ex rel. Dept. of Mental Health & Substance Abuse Servs.,
165 F.3d 1321 (10th Cir. 1999) 19

Stacks v. Southwestern Bell Yellow Pages, Inc.,
27 F.3d 1316 (8th Cir. 1994) 7, 16

Stallings v. Hussmann Corp.,
447 F.3d 1041 (8th Cir. 2006) 19

Stimpson v. City of Tuscaloosa,
186 F.3d 1328 (11th Cir. 1999) 7

Walden v. Georgia-Pacific Corp.,
126 F.3d 506 (3d Cir. 1997) 7

Wascura v. City of South Miami,
257 F.3d 1238 (11th Cir. 2001) 7, 17

Willis v. Marion County Auditor's Office,
118 F.3d 542 (7th Cir. 1997) 7

Statutes

28 U.S.C. § 1254(1) 1

29 U.S.C. § 621 20

42 U.S.C. § 1981 20

42 U.S.C. § 2000e(2)(a)(1) 1, 2, 6, 18, 20

Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit (App. 1a-31a) is published at 450 F.3d 476. The memorandum opinion and order of the United States District Court for the District of New Mexico (App. 32a-76a) is unpublished, but unofficially reported at 2004 WL 3426757.

Jurisdiction

The judgment of the court of appeals was entered on June 7, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions Involved

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), which provides as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Statement of the Case

I. BACKGROUND FACTS AND ISSUES

This case, which arises under Title VII of the 1964 Civil Rights Act, stems from an incident of insubordination involving an African American merchandiser, Stephen Peters, who was employed at BCI's facility in Albuquerque, New Mexico.[1] Mr. Peters reported to the local District Sales Manager ("DSM"), Cesar Grado, who is Hispanic. Mr. Grado had no authority to terminate employees, and was required to run all decisions regarding disciplinary action through BCI's Human Resources Department. (App. 35a).

Mr. Peters was scheduled to be off work on the weekend of September 29 and 30, 2001. Due to a shortage of workers, Mr. Grado ordered Mr. Peters to come to work on the weekend. Mr. Peters refused, and Mr. Grado warned him that continued refusal would be considered insubordination and could be grounds for termination. (App. 40a). Mr. Peters admitted in his deposition that he responded by saying: "You do what you have to do, and I will do what I have to do." (App. 40a). True to his word, Mr. Peters did not appear for work as ordered, and was terminated for insubordination. He later claimed he was sick, and presented evidence he had visited a walk-in clinic on Saturday, September 29, 2001. (App. 43a). The EEOC claims that Mr. Peters was a victim of race discrimination, in that white and Hispanic employees who missed work were not treated as harshly. (App. 46a).

---

[1] BCI is a bottler of Coca-Cola® products. Merchandisers are hourly employees whose job duties include product placement, and cleaning, arranging, and rotation of displays and promotional materials in retail grocery outlets. (App. 33a).

The termination decision was actually made by Pat Edgar who, at the time, was a Human Resources Manager working in Phoenix but who had supervisory authority over Albuquerque. It is undisputed that Ms. Edgar did not know that Mr. Peters was African American when she made the termination decision. (App. 9a). She based her decision in part, but not exclusively, on Mr. Grado's account of Mr. Peter's statements and actions. Ms. Edgar never spoke to Mr. Peters prior to the termination; however, she did pull Mr. Peters' personnel file, discovering an unrelated but similar incident of insubordination two years before, including a final warning, which also contributed to her decision to terminate. The prior incident of insubordination did not involve Mr. Grado. (App. 42a-43a).

Contrary to the EEOC's characterization of the incident, Mr. Grado did not initially contact Ms. Edgar in order to report Mr. Peters' insubordination. Rather, he contacted Ms. Edgar, before he ever contacted Mr. Peters, for advice on handling the possibility that Mr. Peters would refuse to work on the weekend (which in fact occurred). Thus, Ms. Edgar was involved in advising Mr. Grado while the incident was unfolding. Ms. Edgar walked Mr. Grado through the exact statements to make and instructions to give to Mr. Peters, and it is undisputed that Mr. Grado followed Ms. Edgar's directions. It is also undisputed that Mr. Grado was never asked for his opinion as to what should happen to Mr. Peters based on his refusal to work, never recommended termination, and, in fact, never made any comments or suggestions at all other than asking Ms. Edgar's advice on how to handle the situation and reporting to her what had occurred. (App. 44a).

The EEOC argued that a subordinate bias theory of liability (sometimes referred to as "cat's paw" or "rubber

stamp" liability)[2] should apply, because the termination decision, though made by Ms. Edgar, was supposedly influenced by racial bias on the part of Mr. Grado. The EEOC presented some rather vague and conclusory declarations from former, disgruntled employees, indicating that Mr. Grado previously treated other African Americans worse than white or Hispanic employees, and made racially disparaging remarks towards African Americans. (App. 46a – 47a). The EEOC claimed that Mr. Grado, though he never expressly recommended or even mentioned termination, presented Ms. Edgar with a distorted version of what occurred with Mr. Peters, resulting in his termination.

II. DECISION OF THE DISTRICT COURT

The District Court granted summary judgment in favor of BCI, dismissing the case in its entirety. (App. 76a). The district court found that there was no question that Mr. Peters' conduct (most significantly, his undisputed admonition to Mr. Grado to "do what you have to do") was insubordination warranting termination (App. 58a), and that Ms. Edgar had no idea Mr. Peters was African American when she made the termination decision. (App. 69a-71a). The district court also

---

[2] The "cat's paw" doctrine derives its name from a fable in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. Courts typically use "cat's paw" language to refer to a situation in which a biased subordinate who lacks decision making power uses the formal decision maker as a dupe to carry out a discriminatory employment action. (App. 14a). The "rubber stamp" doctrine refers to a situation in which a decision maker gives perfunctory approval for an adverse employment action initiated or recommended by a biased subordinate. (App. 15a). Judge Posner is believed to have been the first to use the descriptor "cat's paw" for this category of claim. *See Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990).

found that, while there was sufficient evidence to conclude that Mr. Grado was racially biased (App. 71a) (a decision with which BCI disagrees), there was insufficient evidence of influence by Mr. Grado on the termination decision to warrant application of a subordinate bias theory of liability. (App. 66a-67a,71a). The court pointed to the fact that Mr. Grado never made any recommendation to Ms. Edgar as to what should happen to Mr. Peters, and to the fact that Ms. Edgar independently researched Mr. Peters' employment history prior to making the termination decision. (App. 66a-67a,71a).

III. DECISION OF THE TENTH CIRCUIT

The Tenth Circuit reversed the order of summary judgment, holding that the district court misapplied the subordinate bias theory of liability because it placed too much emphasis on the fact that Mr. Grado made no express recommendation to terminate Mr. Grado. (App. 21a-22a). The Court expressly rejected the notion that a plaintiff must show that a decisionmaker followed the recommendation of a biased subordinate in order to prevail under a subordinate bias theory of liability, thereby effectively overruling a prior Tenth Circuit decision addressing this issue. *See English v. Colorado Dep't of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001).

The Court also ruled that Ms. Edgar's independent investigation of the report received from Mr. Grado--namely, looking at Mr. Peters' personnel file including his prior history of insubordination—was insufficient, as a matter of law, to defeat the inference that Mr. Grado's racial bias tainted her decision. (App. 30a-31a). The Court implied that direct contact by the decisionmaker with the accused employee is an essential requirement for a true "independent

investigation" sufficient to negate subordinate bias liability. (App. 30a-31a). The Court acknowledged that Mr. Peters telling Mr. Grado to "do what you have to do" was undeniably insubordinate, but focused on discrepancies (which BCI contended were immaterial) between Mr. Grado's and Mr. Peter's accounts of events leading to the termination, pointing out that only Mr. Grado's version of events was relayed to Ms. Edgar. (App. 28a-30a). The Court held that whether or not Mr. Grado's supposed bias was a factor in the termination decision was for a jury to decide, and remanded the case for trial. (App. 31a).

REASONS FOR GRANTING THE PETITION

BCI respectfully submits that there are two reasons why this Court should grant its petition for writ of certiorari and review the Tenth Circuit's decision. First, as the Tenth Circuit and other courts have recognized, there is a distinct split of opinion among the circuit courts of appeal as to the proper standard for applying subordinate bias liability, or the so-called "cat's paw" theory of liability, under Title VII. Second, the Tenth Circuit's ruling hinges upon an important question of federal employment law that has not been, but should be, settled by the Supreme Court: namely, under what circumstances may an employer be held liable for intentional discrimination when the person who made the adverse employment decision admittedly harbored no discriminatory bias toward the impacted employee.

I. THE CIRCUITS ARE SPLIT

Judge Posner of the Seventh Circuit is believed to have been the first to use the descriptor "cat's paw" to label the doctrine of employer liability based upon the motivations of a biased subordinate. *See Shager*, 913 F.2d at 405. The

circuit courts of appeal that have subsequently considered the issue of subordinate bias liability have generally embraced the concept that an employer's culpability for an adverse employment decision may sometimes extend beyond the motivations of the official decisionmaker. *See, e.g., Gee v. Principi*, 289 F.3d 342, 345-47 (5th Cir. 2002); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 876-78 (6th Cir.), *reh'g denied*, 266 F.3d 407 (2001); *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001); *Abramson v. William Paterson Coll. of New Jersey*, 260 F.3d 265, 285-86 (3d Cir. 2001); *Wascura v. City of South Miami*, 257 F.3d 1238, 1247 (11th Cir. 2001); *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001); *Rios v. Rossotti*, 252 F.3d 375, 381-82 (5th Cir. 2001); *English v. Colorado Dep't of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226-28 (5th Cir. 2000); *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231 (10th Cir. 2000); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1331 (11th Cir. 1999); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249-50 (11th Cir. 1998), *reh'g denied*, 178 F.3d 1305, *cert. denied*, 528 U.S. 930 (1999); *Griffin v. Washington Convention Ctr.*, 142 F.3d 1308, 1310-11 (D.C. Cir. 1998); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998); *Eiland v. Trinity Hosp.*, 150 F.3d 747, 752 (7th Cir. 1998); *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997); *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 514-15 (3d Cir. 1997), *cert. denied*, 523 U.S. 674 (1998); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1325 (8th Cir. 1994). As expressly acknowledged by the Tenth Circuit, however, there has been much confusion, disagreement, and outright debate over both the appropriate analytical framework for such a theory of

liability, and the facts that a plaintiff must show to permit it to be applied.

A. There is an Acknowledged Split Among the Tenth/Seventh, Fifth, and Fourth Circuit Courts of Appeal With Respect to Subordinate Bias Liability

Prior to the Tenth Circuit's decision in this case, the most fully fleshed-out analyses of the subordinate bias theory of liability were found in decisions from the Seventh, Fourth, and Fifth Circuits, none of which utilized the same standards or approach in applying the theory. *Compare Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004), *cert. dismissed*, 543 U.S. 1132 (2005), *with Russell*, 235 F.3d at 219, *with Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004). Before setting forth its own analysis, the Tenth Circuit expressly acknowledged this split of authority:

> Despite broad support for some theory of subordinate bias liability, our sister circuits have divided as to the level of control a biased subordinate must exert over the employment decision.

(App. 18a)

The Tenth Circuit then presented its own characterization of the split, first recognizing what it described as a "lenient" approach, currently followed by the Fifth Circuit, wherein a plaintiff is merely required to demonstrate some "influence" over the titular decision maker in order to prevail on a theory of subordinate bias liability. (App. 18a-19a) (*citing Russell*, 235 F.3d at 227). Under this view

> summary judgment generally is improper where the plaintiff can show that an employee with discriminatory animus provided factual information or other input that may have affected the adverse employment action.

(App. 19a) (*quoting Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994)). The Tenth Circuit rejected this "lenient" approach, observing that "[s]uch a weak relationship between the subordinate's actions and the ultimate employment decision improperly eliminates a requirement of causation." *Id.*

The Tenth Circuit next discussed the approach set forth in *Hill*, 354 F.3d at 277, in which the Fourth Circuit held that

> to survive summary judgment, an aggrieved employee who rests a discrimination claim...upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker of the employer.

Id. at 291. In *Hill*, the Fourth Circuit ruled that an employer cannot be held liable unless this standard is met, even if there is evidence the biased subordinate exercised "substantial influence" or played a "significant" role in the employment decision. *Id.* at 289. The Tenth Circuit rejected the Fourth Circuit's standard as being so strict as to undermine the deterrent effect of subordinate bias claims. (App. 20a).

After characterizing the Fifth and Fourth circuits as being at "opposite extreme[s]" on the issue of subordinate bias liability (App. 19a), the Tenth Circuit announced it was aligning itself with the Seventh Circuit, which, while expressly rejecting the "actual decision maker" standard set forth by the Fourth Circuit in *Hill*, also requires the plaintiff to establish more than mere "influence" or "input" in the decisionmaking process in order to prevail on a claim based on subordinate bias. (App. 20a-21a) (*citing Lust*, 383 F.3d at 584 (Posner, J.)). The Tenth Circuit thus embraced what might be described as the "causation" standard of subordinate bias liability, an approach that requires the plaintiff to establish a causal link between the subordinate's bias and the adverse employment decision. *Id.* at 488.

The Tenth Circuit is not the first court to wrestle with intra-circuit confusion, disagreement, and conflicting precedent on the issue of subordinate bias liability, nor is it the first court to observe the extra-jurisdictional conflict among the circuits on how this theory is articulated and applied. In the *Hill* decision, for instance, a divided Fourth Circuit panel initially reversed an award of summary judgment to the employer, applying a theory of subordinate bias liability based on the "substantial influence" standard applied by the Fifth Circuit. *See* Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, No. 03-1443, 2004 WL 838126 at *4 ("*Hill* Petition"). The dissenting panel member maintained that an employer could be held liable only if there was a discriminatory purpose on the part of the "actual decisionmaker." *Id.* at *4-5. The Fourth Circuit reheard the case *en banc*, voting 7-4 to vacate the panel opinion and reinstate the award of summary judgment. *Id.* at 5.

Like the Tenth Circuit, the Fourth Circuit in *Hill* expressly acknowledged the split of opinion on this issue, observing that "while the courts often utilize the same terminology...they have not always described the theory in a consistent way...." *Hill*, 354 F.3d at 290. The *en banc* majority opinion in *Hill* frankly recognized that its holding conflicted with the Fifth Circuit's decision in *Laxton v. Gap, Inc.*, 333 F.3d 572 (5th Cir. 2003), which held that "the relevant inquiry is whether the supervisor harboring a discriminatory animus had 'influence or leverage over' the decisionmaking of those 'principally responsible' for the adverse employment actions." *Hill*, 354 F.3d at 290 (*quoting Laxton*, 333 F.3d at 584). The dissent in *Hill* also acknowledged the split, noting that the majority's decision "puts us at odds with virtually every other circuit..." *Id.* at 299.

The Seventh Circuit (specifically, Judge Posner, revisiting the "cat's paw" theory of liability which he inaugurated fourteen years prior) has also expressly acknowledged the split of authority on this issue, stating that the rationale set forth by the Fourth Circuit in *Hill* is "not the view of this court." *Lust*, 383 F.3d at 584. Judge Posner pointedly criticized the *Hill* court for applying what he characterized as an overly literal reading of his earlier opinion in *Shager*:

> The [cat's paw] formula was (obviously) not intended to be taken literally (Sealy employs no felines), and were it taken even semiliterally it would be inconsistent with the normal analysis of causal issues in tort litigation.

Id. As is readily apparent from Judge Posner's comments, as well as the conflicting commentary and analysis set forth in

the *Hill* case and the case at bar, the issue of subordinate bias liability presents a pronounced divergence of opinion, ripe for resolution by this Court.

B. The Tenth and Fourth Circuit Courts of Appeal are in Conflict over the Proper Application of *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), in the Area of Subordinate Bias Liability

In articulating their contradictory standards for subordinate bias liability, the Fourth and Tenth Circuits based their holdings, in part, on this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000). In *Reeves*, this Court reinstated a jury verdict for a plaintiff, finding that he had produced sufficient evidence of age discrimination. This evidence included testimony that Powe Chestnut, the director of manufacturing (and the company president's husband) harbored age animus against the plaintiff. *Id.* at 151. Although the president, Sandra Sanderson, made the decision to terminate plaintiff's employment, this Court acknowledged plaintiff's "evidence that Chestnut was motivated by age-based animus and was *principally responsible* for [plaintiff's] firing." *Id.* (emphasis added). The Court also noted plaintiff's evidence that "Chestnut was the *actual decisionmaker* behind his firing" even though it was Sanderson "who made the formal decision to discharge [plaintiff]." *Id.* at 152 (emphasis added).

Relying upon this language in *Reeves*, the Fourth Circuit stated that:

> *Reeves* informs us that the person allegedly acting pursuant to a discriminatory animus need not be the "formal decisionmaker" to

> impose liability upon an employer for an adverse employment action, so long as the plaintiff presents sufficient evidence to establish that the subordinate was the one "principally responsible" for, or the "actual decisionmaker" behind, the action.

Hill, 354 F.3d at 288-89. The Fourth Circuit rejected the argument that this language in *Reeves* "does not define the outer contours of who may be considered a decisionmaker for purposes of imposing liability upon an employer." *Id.* at 289. Rather, the court embraced the *Reeves* language, and further noted that "the Court's clear emphasis upon who holds the 'actual decisionmaking' power and authority or who has 'principal responsibility' for an employment decision is consistent with the limitations set forth in [*Burlington Indust., Inc. v. Ellerth*, 524 U.S. 742 (1998)]." *Id.*

In adopting a different standard than *Hill*, the Tenth Circuit expressly rejected *Hill*'s reliance upon *Reeves*. In a clear contradiction of opinion, the Tenth Circuit stated that "[t]he Fourth Circuit's strict approach makes too much of the phrase 'actual decisionmaker' in *Reeves*; the Court was describing what the petitioner's evidence showed, not prescribing the 'outer contours' of liability." (App. 20a). Finding the *Hill* court's reliance upon *Reeves* "peculiar," *id.*, the Tenth Circuit stated bluntly that the Fourth Circuit's "focus on 'who is a decisionmaker' for purposes of discrimination actions seems misplaced." *Id.* (citation omitted). Moreover, while the Fourth Circuit found its standard consistent with this Court's agency analysis in *Ellerth*, the Tenth Circuit found just the opposite. *Compare Hill*, 354 F.3d at 289 *with* App. 20a.

The circuit split over the appropriate standard for subordinate bias liability, therefore, includes a circuit split over the proper application of this Court's holdings and findings in *Reeves*. This circuit split further supports BCI's petition for review as this case will present the opportunity for this Court to rule upon how its findings in *Reeves* affect and control the contours of subordinate bias liability.

C. Other Circuit Courts of Appeal Apply Different Standards of Subordinate Bias Liability

The current stand-off among the Tenth/Seventh, Fifth, and Fourth circuits on the appropriate standard for application of subordinate bias liability is only the latest permutation of a shifting but longstanding discord among the circuits (and even within circuits) regarding this issue. *See, e.g, Hill* Petition, *9-19 (gathering and summarizing cases applying various theories of subordinate bias liability). Over the years, courts have widely differed on the level of influence that an allegedly biased subordinate or supervisor must have on the ultimate decisionmaker, and the level of involvement the subordinate must have in the decisionmaking process, before liability will be imposed on the employer.

A prime example of this divergence of opinion is presented by the case at bar, where the Tenth Circuit announced and applied a standard that conflicts with its prior precedent. Specifically, the court stated that, under its chosen standard for application of a theory of subordinate bias liability, an employer may be liable even if the biased subordinate never expressly recommended termination. (App. 21a-22a). Indeed, the Tenth Circuit held that the trier of fact might conclude that Mr. Grado caused Mr. Peters' termination, despite the fact that Mr. Grado admittedly made no comments or suggestions at all regarding what should

happen to Mr. Peters.[3] In so doing, the Tenth Circuit effectively overruled circuit precedent, which required that a claimant "must show that the decisionmaker 'followed the biased recommendation [of a subordinate] without independently investigating the complaint against the employee.'" *See English*, 248 F.3d at 1011. By altering its position on the requirement of a recommendation, the Tenth Circuit not only contradicted (without expressly overruling) its precedent, but also placed itself in opposition to numerous cases clearly indicating that, in order for subordinate bias liability to apply, a subordinate must assert more overt influence over the decisionmaker and/or play a more proactive role in instigating or orchestrating the employment decision than occurred in the case at bar. *See, e.g., Russell*, 235 F.3d at 221 (finding that plaintiff's fellow-manager substantially influenced the termination decision of upper-level management, when he gave his boss the ultimatum that he would quit if she did not fire the plaintiff); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) (stating that plaintiff's direct supervisor substantially influenced the termination where he had repeated "daily conference calls" with regional manager regarding plaintiff, and was asked for his opinion regarding plaintiff's dismissal).

The Sixth Circuit has also offered varying standards. In a 1998 case, the court stated that "remarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless *played a meaningful role* in the decision to terminate the plaintiff, were relevant." *Ercegovich*, 154 F.3d

---

[3] Even assuming Mr. Grado harbored a racial bias, the EEOC failed to present any evidence demonstrating that Mr. Grado, who was short-staffed and desperately seeking workers to cover shifts, wanted Mr. Peters to be terminated. (App. 38a-39a).

at 354-55 (emphasis added). Three years later, however, the court ignored *Ercegovich*'s "meaningful role" standard and stated that "the plaintiff must offer evidence that the supervisor's racial animus was the cause of the termination or *somehow influenced* the ultimate decisionmaker." *Christian*, 252 F.3d at 877 (emphasis added).

Whereas the Sixth Circuit maintains the different standards of a subordinate's level of involvement —"meaningful role" vs. "somehow influenced"— the Ninth Circuit applies a more lenient standard than either of the Sixth Circuit standards, requiring that the subordinate merely be "involved" in (as opposed to have actually influenced) the decision. *See Bergene*, 272 F.3d at 1141 (stating that, "[e]ven if a manager was not the ultimate decisionmaker, that manager's retaliatory motive may be imputed to the company if the manager *was involved* in the hiring decision"). The Eighth Circuit, on the other hand, describes its standard in terms of whether the subordinate used the ultimate decisionmaker as a conduit and actually acted to set the plaintiff up to fail. *See Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051 (8th Cir. 1993); *Stacks*, 27 F.3d at 1316.

Some circuit courts of appeal simply state that liability will be imposed if there is evidence that the biased subordinate merely "influenced" the ultimate decisionmaker. The First Circuit, for example, stated that, in order to prove that the employer's reason for the adverse action was a pretext for discrimination, the employee need only "show that discriminatory comments were made by the key decisionmaker or *those in a position to influence the decisionmaker*." *Santiago-Ramos,* 217 F.3d at 55 (emphasis added). The Third Circuit described the standard differently, stating that, "[ū]nder our case law, it is sufficient if those exhibiting discriminatory animus *influenced or participated in*

the decision to terminate." *Abramson*, 260 F.3d at 286 (Alito, J., participating) (emphasis added).[4]

The level of influence that must be exerted by a biased subordinate in order to impose liability on the employer is higher in the Eleventh Circuit. In that circuit, liability will be imposed where the biased subordinate actually "*is* the decisionmaker, and the titular 'decisionmaker' is a mere conduit for the harasser's discriminatory animus." *Llampallas*, 163 F.3d at 1249 (emphasis in original). *See also Wascura*, 257 F3d at 1247 (indicating that the biased subordinate must be a "dominant decision-maker whose decision was rubber-stamped by others"). The District of Columbia Circuit has spoken in reverse terminology, "holding that evidence of subordinate bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence." *Griffin*, 142 F.3d at 1312 (Ginsburg, J.).

As these decisions reveal, there existed intercircuit and intracircuit disagreement over the appropriate standard long before the issue ripened over the last two years in *Hill*, *Lust*, *Russell*, and (now) *BCI*. In short, there is a longstanding, expressly acknowledged circuit split with respect to the determinative issue in this case, bringing this matter squarely within the ambit of this Court's discretionary jurisdiction.

---

[4] The Third Circuit cited, among other cases, the D.C. Circuit's 1998 decision, authored by then-Judge Ginsburg, wherein the court held that "evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence." *Griffin*, 142 F.3d at 1312 (Ginsburg, J.).

II. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW

The ultimate question in any employment discrimination case involving a claim of disparate treatment is whether the plaintiff was a victim of intentional discrimination. *Reeves*, 530 U.S. at 153. This ultimate question is at the heart of the matter that was presented to the Tenth Circuit in this case: Based on the undisputed facts, could a reasonable trier of fact conclude that Mr. Peters was subjected to intentional discrimination on the basis of his race? It is clear that the answer to this question would have been different if the matter had arisen in the Fourth Circuit. Indeed, the case might have turned out very differently even under the supposedly "lenient" standard applied in the Fifth Circuit, where in *Russell*, the Fifth Circuit found that a theory of subordinate bias liability was applicable in a case where the influence exercised by the subordinate over the decisionmaking process far exceeded the supposed "influence" exerted by Mr. Grado over Ms. Edgar. *See Russell*, 235 F.3d at 228 (observing that the allegedly biased subordinate exerted so much influence over the decisionmaker that she "essentially regarded her decision to terminate [the employee] as ordained by other forces"). In fact, the case might have turned out differently in any circuit, even the Tenth Circuit, depending upon the predilections of the panel regarding which of the various available standards to apply. Such indirection and ambiguity in the law severely undermine the best efforts of multi-jurisdictional employers such as BCI to comply with Title VII and other anti-discrimination laws.

In the realities of today's workplace, ultimate decisions are frequently made by decisionmakers who are at some level removed from employees and who must rely to varying

degrees on information received from subordinates. Indeed, the practice utilized by BCI in this case, of elevating the decision at issue to trained Human Resources personnel, is inarguably a deterrent against discrimination, as it provides for consistent application of policies and neutrality in decisionmaking. Are employers such as BCI best advised to eschew such centralized decisionmaking, either entirely, or in certain areas, depending upon the prevailing judicial views in its various operational divisions? As the Tenth Circuit suggests, is someone in Ms. Edgar's position required to have direct contact with the employee at issue in every instance, in order to avoid a claim based upon subordinate bias liability? And if that is the case, does that mean it is now appropriate, in contradiction to the overwhelming weight of prior authority,[5] for courts to act as "super personnel department(s)" dictating in minute detail the practices of employers? All of these extremely important and timely questions underlie the issue presented for review, and make this case an excellent vehicle for the Court to provide much-needed guidance to employers, employees, the EEOC, and all interested parties, regarding these matters.

---

[5] The following cases state that courts may not act as a "super personnel departments" that second guess employers' business judgments: *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1197 (10th Cir. 2006) (quoting *Simms v. Oklahoma ex rel. Dept. of Mental Health and Substance Abuse Serv.*, 165 F.3d 1321, 1330 (10th Cir. 1999)); *Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1203 (10th Cir. 2006); *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 628 (6th Cir. 2006); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1052 (8th Cir. 2006); *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1181 (7th Cir. 2002), *cert. denied*, 537 U.S. 884 (2002); *Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006).

The issue presented for review undeniably has a far-reaching impact, applying to all employers covered by federal anti-discrimination laws, including Title VII, 42 U.S.C. § 1981, and the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA").[6] *Christian*, 252 F.3d at 868; *Hill*, 354 F.3d at 283-84, 286-87. Moreover, parties on all sides of the issue agree both as to the importance of the issue and the need for guidance—as the Court will recall, the unsuccessful plaintiff in the *Hill* case petitioned this Court for review of this very issue in 2004.[7] *See Hill* Petition, 2004 WL 838126. In fact, the Court invited the Solicitor General to submit a brief addressing the issue of subordinate bias liability, prior to the petitioner's voluntary withdrawal of the petition in *Hill*. BCI is hopeful the Court will seize upon this renewed opportunity to articulate a reasonable, universal standard for application of the subordinate bias theory of liability.

---

[6] This Court's review of this issue will also have an impact on state anti-discrimination laws, as state courts frequently look to federal law for guidance when applying their own state anti-discrimination statutes. *See, e.g., Ocana v. American Furniture Co.*, 91 P.3d 58, 68 (N.M. 2004) (applying New Mexico law); *Christian*, 252 F.3d at 880 (applying Ohio law); *Beason v. United Tech. Corp.*, 337 F.3d 271, 276 (2d Cir. 2003) (applying Connecticut law); *LaBove v. Raftery*, 802 So. 2d 566, 573 (La. 2001) (applying Louisiana law).

[7] The EEOC has gone on record opining about the importance of the issue of subordinate bias liability, filing an amicus brief with the Fourth Circuit in the *Hill* case.

CONCLUSION

For all of the reasons set forth above, BCI Coca-Cola Bottling Company of Los Angeles respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

ERIC TODD PRESNELL
Counsel of Record
KARA E. SHEA
MILLER & MARTIN PLLC
1200 ONE NASHVILLE PLACE
150 FOURTH AVENUE NORTH
NASHVILLE, TENNESSEE 37219
615-244-9270

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 04-2220

[Filed June 7, 2006]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff-Appellant*,	)
v.	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, doing business as Phoenix Coca-Cola Bottling Company; COCA-COLA BOTTLING COMPANY OF ALBUQUERQUE, *Defendants-Appellees*.	)

ORDER

BEFORE: LUCERO, McKAY, and McCONNELL, Circuit Judges.

The Equal Employment Opportunity Commission ("EEOC") asks us to reverse the district court's decision

granting summary judgment to BCI Coca-Cola Bottling Co. of Los Angeles ("BCI") on a claim of race discrimination arising from the termination of a black employee, Stephen Peters. It is undisputed that the human resources official who made the decision to terminate Mr. Peters worked in a different city, had never met Mr. Peters, and did not even know that he was black. In making the decision to terminate, however, the human resources official relied exclusively on information provided by Mr. Peters' immediate supervisor, who not only knew Mr. Peters' race but allegedly had a history of treating black employees unfavorably and making disparaging racial remarks in the workplace. Because we find that genuine issues of material fact exist as to whether BCI's proffered explanation for the termination is a pretext for racial discrimination, we reverse the decision of the district court and remand for further proceedings.

I. Factual and Procedural Background

Stephen Peters worked as a merchandiser for BCI at its Albuquerque, New Mexico facility from May 1995 through October 2001. More than 60% of the 200 employees at the Albuquerque facility were Hispanic, while fewer than 2% were black. Merchandisers are hourly employees responsible for placement of Coca-Cola products in retail outlets such as grocery stores. Their job duties include arranging, cleaning, and rotating product displays and promotional materials. They generally work five days a week, with two days off, but because grocery stores remain open seven days a week, merchandisers' schedules are staggered and they must occasionally work overtime to cover shifts. As the most senior merchandiser in the district, Mr. Peters had the most desirable schedule, with Saturdays and Sundays off. He was generally regarded as a "good merchandiser," and in 2001 he received a certificate from BCI thanking him for five years of

"service, dedication and commitment to the Company." App. 143, 151. The certificate specifically thanked him for "being a team player." *Id.* at 151.

Mr. Peters reported to Cesar Grado, a District Sales Manager, who is Hispanic. On a day-to-day basis, Mr. Peters was supervised by a salaried Account Manager, Jeff Katt, who is white. Although both Mr. Katt and Mr. Peters both reported directly to Mr. Grado, who handled all scheduling and route assignments for merchandisers and account managers in his district, it was common for merchandisers to call in sick to the account manager who supervised their work. Mr. Grado was responsible for monitoring and evaluating the employees under his supervision, but was not authorized to discipline or terminate anyone. Instead, Mr. Grado had broad discretion to "bring facts relating to the matter to the attention of [the] Human Resources Department," which was ultimately responsible for deciding which company policy applied and whether to take any disciplinary action. App. 34. The highest-ranking human resources official in the Albuquerque office was Sherry Pederson. Ms. Pederson's supervisor, Pat Edgar, worked 450 miles away in BCI's Phoenix, Arizona office. Neither Ms. Pederson nor Ms. Edgar had met or even heard of Mr. Peters until September 28, 2001, four days before his termination.

The weekend of September 29-30, 2001, Mr. Grado faced a serious scheduling crunch. Several stores in his district were running ads for Coca-Cola products, necessitating an extra merchandiser for the weekend, and on the morning of Friday, September 28 he learned that another merchandiser who ordinarily worked as a "floater" to cover extra shifts had suffered an on-the-job injury and would be out for a week. Sometime between midday and 2:00 pm on Friday, Mr.

Grado directed Mr. Katt to direct Mr. Peters to work on Sunday, September 30.[1] When Mr. Katt relayed the instruction, Mr. Peters responded, "I can't do it. I've got plans." *Id.* at 67. According to Mr. Grado, when Mr. Katt recounted the conversation he added that Mr. Peters said he "might call in sick." *Id.* at 35. Both Mr. Peters and Mr. Katt, however, deny that Mr. Peters said anything about being sick during that conversation, and Mr. Katt denies passing along any such comment to Mr. Grado.

Frustrated, Mr. Grado decided to seek advice from the Human Resources Department. Ms. Pederson was out of the office on Friday afternoon, so Mr. Grado called Ms. Edgar in Phoenix. Mr. Grado said that he expected Mr. Peters was going to refuse to come to work on Sunday, and asked whether he could require Mr. Peters to come in on his day off. Specifically, he told Ms. Edgar that Mr. Peters planned to call in sick on Sunday. Ms. Edgar found that prospect "unacceptable" because, under BCI policy, an employee may not call in sick two days in advance. *Id.* at 23. She advised Mr. Grado to "find out what the situation was" and, unless Mr. Peters had a "compelling reason" why he could not come to work, to order Mr. Peters to work on Sunday. *Id.* She told Mr. Grado to characterize the instruction as a "direct order" and to say that failure to comply would amount to insubordination, which is grounds for termination. *Id.*

---

[1] In his declaration, Mr. Grado stated that he had already discussed the matter with Mr. Katt and Mr. Peters had already agreed to work on Sunday, September 30. It is unclear, then, why he contacted Mr. Katt to order Mr. Peters yet again to work that day. In any case, Mr. Katt denies that Mr. Grado ever contacted him before Friday at 2:00 concerning the possibility that Mr. Peters might work on Sunday.

Mr. Grado then paged Mr. Peters, who called immediately. Mr. Grado ordered Mr. Peters to work on Sunday, and Mr. Peters responded that he had plans.. Mr. Grado says that he asked Mr. Peters what his plans were, but that Mr. Peters angrily responded that his plans were "none of [Mr. Grado's] business," and started yelling. Mr. Peters says that Mr. Grado never asked his plans; instead, he simply told Mr. Grado that he had plans and that he had not been feeling well all week. They both agree, however, that Mr. Grado said, "I'm not asking you to come to work, I'm telling you to come to work. If you do not come to work, it could lead to insubordination and could lead to termination." *Id.* at 58. They also agree that the conversation ended with Mr. Peters telling Mr. Grado, "[D]o what [you] got to do and I'll do what I got to do." *Id.* Mr. Peters claims that he intended this statement as a way to end the conversation without a confrontation. Mr. Grado interpreted it as open defiance, and a firm intention to disobey the order to come to work on Sunday.

Late in the afternoon on Friday, Mr. Grado again contacted Ms. Edgar in Phoenix. He related "exactly what had happened": that he had asked Mr. Peters to describe his plans, but that Mr. Peters had refused to say what his plans were, had angrily said his plans were "none of [Mr. Grado's] business," and had told Mr. Grado to "do what he needed to do." *Id.* at 24, 65. Ms. Edgar determined at that time that Mr. Peters' conduct in that conversation, standing alone, amounted to insubordination warranting termination. Nonetheless, because it was late in the day on Friday, she did not make the decision to terminate Mr. Peters that day.

In fact Mr. Peters was sick. On the evening of Saturday, September 29 he cancelled his plans for Sunday and went to an urgent care clinic, complaining of a headache, sinus pain,

and cough. A doctor diagnosed him with a sinus infection, gave him a prescription, and directed him not to return to work until Monday, October 1. That night Mr. Peters phoned Mr. Katt and explained that he had just come from the doctor's office and probably could not work Sunday because of illness. Mr. Katt "said he didn't have any problem with that," but asked Mr. Peters to call in the morning if he felt well enough to work. *Id.* at 197. After hanging up, Mr. Katt repeatedly tried to page Mr. Grado to describe the conversation, but for some reason Mr. Grado never responded to the pages.

Mr. Peters did not work on Sunday, September 30. Mr. Katt and Mr. Grado personally worked routes that day to ensure coverage. Mr. Peters returned to work as usual on Monday morning.

On Monday, October 1, Ms. Edgar held a series of phone calls with Ms. Pederson (who was back in the office) and Mr. Grado concerning Mr. Peters' conduct. Mr. Grado explained that Mr. Peters had not come to work on Sunday. Also, Ms. Pederson pulled Mr. Peters' file and found a Disciplinary Status Notice describing an incident in 1999 where Mr. Peters received a two-day disciplinary suspension and "final warning" for insubordination from a different supervisor. During that incident, the supervisor had called Mr. Peters on a Friday morning and ordered him to work on his day off that weekend. Mr. Peters refused and, according to the status notice, "was rude and unprofessional in his conduct." *Id.* at 53. He was warned that "[a]ll Coca-Cola employees must... follow direct orders from their supervisors. Failure to comply is considered a direct act of insubordination.... subject to disciplinary action up to and including termination." *Id.* at 54. Although Ms. Edgar did not know it, because the file provides no further details, Mr. Peters had

good reason to be upset during the 1999 incident. He had learned earlier that week that his fiancee's son -- whom he had raised as his own son for years -- had been killed in a car accident. He could not work that Saturday because he had to serve as a pallbearer at the funeral. His supervisor told him that the funeral was no excuse for refusing a direct order because "he was not your biological son." *Id.* at 147.

By the end of the day on Monday, Ms. Edgar made a final decision to terminate Mr. Peters for insubordination. In a declaration prepared as part of this litigation in 2004, Ms. Edgar said that her decision was based "[f]irst and foremost" on "the conduct of Mr. Peters toward Mr. Grado on Friday." *Id.* at 26. The 1999 incident from the file reinforced for Ms. Edgar that Mr. Peters had a track record of insubordination, and also contributed to the decision. She emphasized that "Mr. Peters was not terminated because he did not show up for work on Sunday, except to the extent this conduct is viewed in context with his exchange with Mr. Grado on Friday... as the fulfillment of Mr. Peters [sic] stated intention to defy a direct order from Mr. Grado." *Id.* at 27. Ms. Edgar claims that she had already learned, in a conversation with Mr. Grado, that Mr. Peters had been excused by Mr. Katt from work on Sunday, but that this information did not affect her decision. She found Mr. Peters' "alleged sickness" to be "highly suspect," and "found it particularly suspicious that Mr. Peters chose to call in sick to Mr. Katt, rather than Mr. Grado, given the fact that Mr. Peters had been warned by Mr. Grado the day before that if he did not come to work he would be subject to termination." *Id.* at 27.

Mr. Katt's deposition provides a different account of these events. Mr. Katt says that he did not tell Mr. Grado that Mr. Peters phoned in sick until Monday evening at 6:00 pm, during a discussion of the upcoming week's schedule. Mr.

Katt asked which route Mr. Peters was going to cover, and Mr. Grado replied, "I think I'm going to terminate him." *Id.* at 203. Mr. Katt asked, "You do know he called in, he called in sick to me?" *Id.* at 204. Mr. Grado "kind of paused" and asked, "Why didn't you tell me that earlier?" *Id.* Mr. Katt replied, "I did. I tried to page you." *Id.* According to Mr. Katt, this exchange took place Monday evening, after Ms. Edgar already made her decision to terminate Mr. Peters.

Mr. Peters was terminated Tuesday morning, October 2, at a meeting attended by Mr. Peters, Mr. Grado, Mr. Grado's supervisor Don Bateluna, and Ms. Peterson. Mr. Grado began the discussion by announcing, "You've been terminated for insubordination, for not showing up for work." *Id.* at 193. Mr. Peters was promptly presented with a termination paper. That document said nothing about Mr. Peters raising his voice or refusing to explain his plans during the phone conversation on Friday. Instead, the notice states that Mr. Peters had been given a direct order to work on Sunday, and had been warned that "failure to comply with the directive would be considered insubordination and would result in termination." *Id.* at 41. It concludes, "You did not report to work on Sunday 9-30-01, therefore your employment in [sic] being terminated for insubordination." *Id.* The "violation date" listed is Sunday, September 30, the day Mr. Peters was supposed to come to work, not Friday, September 28, the day of the conversation with Mr. Grado. *Id.*

Mr. Peters explained that he had not reported to work because he was sick. He said that he had called Mr. Katt and had received permission to miss work that day "because I went to the doctor." *Id.* at 193. He protested that "[n]either one of [you] asked me why I didn't show up for work." *Id.* Mr. Peters says that after he told them about the call to Mr.

Katt, "they all got quiet. And when I left they shut the door and was [sic] in there talking." *Id.*

Shortly after that meeting, Ms. Pederson called Ms. Edgar and asked whether she knew Mr. Peters was black. Neither Ms. Pederson nor Ms. Edgar had ever met Mr. Peters, and neither knew that he was black until the meeting on Tuesday morning. Apparently Ms. Pederson's inspection of the file was so cursory that she did not even learn basic information such as Mr. Peters' race -- which was noted on several documents in his personnel file -- even as she was taking steps toward terminating him. Ms. Edgar maintains that "[r]ace played no part whatsoever in my decision to terminate the employment of Stephen Peters." *Id.* at 28. Indeed, part of her job as a human resources official was to conduct affirmative action and equal employment opportunity training sessions for BCI management.

On October 11, 2001, Mr. Peters filed a charge with the EEOC alleging that his termination was the result of racial discrimination. The EEOC filed suit on his behalf in federal court on December 30, 2002. Its theory was that, even if Ms. Edgar was the sole decisionmaker and she did not know that Mr. Peters was black, "Grado harbored racial animus toward African American employees and... this bias was properly imputed to BCI because of Grado's substantial involvement in the termination process as Peters' supervisor and Edgar's sole source of information about the events on which BCI alleges the termination was primarily based." Aplt. Br. 12. Relying principally on cases from other circuits, the EEOC characterized this claim as arising under a "cat's paw" or "rubber stamp" theory, whereby an employer may be liable for the acts of a biased subordinate, even if that subordinate is not the formal decisionmaker.

In support of its allegations concerning Mr. Grado's racial bias, the EEOC presented affidavits from a number of other BCI employees. Three other merchandisers who worked under the supervision of Mr. Grado--two black and one Hispanic -- stated that Mr. Grado treated black employees worse than employees of other races. App. 181 (affidavit of James Young) ("African American employees were treated worse by Cesar Grado as compared to non-African American employees."); *id.* at 183 (affidavit of Bryan Esquibel) ("If Grado did not like you, he treated you badly; but African American employees were treated even worse."); *id.* at 185 (affidavit of Michael Wilson) ("It is my belief that Cesar Grado dislikes African Americans based on his treatment of me during my employment at [BCI]."). All three cited specific examples of incidents in which Mr. Grado subjected black employees to greater scrutiny and more serious discipline than Hispanic employees. Mr. Wilson, who is black, says that Mr. Grado "continually demeaned me and threatened to replace me" but always "treated Hispanic Merchandisers with respect." *Id.* at 185.

Mr. Wilson also "recall[ed] many race-based remarks made to me by Cesar Grado during work hours." *Id.* at 184. According to Mr. Wilson, Mr. Grado told jokes about black men dating Anglo women, and stated that "Black guys [do] not look good in trucks, they should drive Cadillacs." *Id.* at 185. One day, while watching Mr. Wilson clean an outdoor vending machine during the winter, Mr. Grado urged him to hurry because "brothers don't like the cold." *Id.* (internal quotation marks omitted). Also, Mr. Katt says that after the termination, during a drive to a work site, Mr. Grado asked, "Did you hear Steve is trying to sue me?" *Id.* at 212. Although he is less than "100 percent clear" about his recollection of the conversation, Mr. Katt says that Mr. Grado may have used the word "nigger" or a comparable

racial epithet to describe Mr. Peters during that conversation. *Id.*

The EEOC also compared Mr. Grado's treatment of Mr. Peters with his treatment of Hispanic employees under similar circumstances. On one occasion, for example, Mr. Grado was short merchandisers during a busy weekend, so he directed Mr. Katt to direct Monica Lovato, a Hispanic merchandiser, to work one of her days off. Ms. Lovato planned to celebrate her birthday that weekend, and she told Mr. Katt she wanted both days off, but Mr. Katt insisted and tried to accommodate her schedule as much as possible. That weekend Ms. Lovato never showed up to work as directed, even after Mr. Katt paged her repeatedly. When he was informed that Ms. Lovato had disobeyed an order to come into work, Mr. Grado never inquired about her reasons. Instead, Mr. Grado remarked, "You can't make somebody work one of their days off." *Id.* at 211. Ms. Lovato never received any discipline -- not even a warning -- as a result of the incident.

The district court granted summary judgment in favor of BCI. Operating within the *McDonnell Douglas* burden-shifting framework, it held that the EEOC had established a prima facie case of discrimination, but that BCI had articulated a legitimate nondiscriminatory reason for the termination: "his insubordinate conduct toward Grado." Mem. Op. & Order, 2004 U.S. Dist. LEXIS 28277 at *33. It held that no genuine issue of material fact exists as to whether this proffered explanation was pretextual because the pretext inquiry must focus exclusively on whether Ms. Edgar honestly believed that Mr. Peters was guilty of insubordination on Friday, September 28. Citing our statement in *Kendrick v. Penske Transportation Services, Inc.*, 220 F.3d 1220, 1231 (10th Cir. 2000), that pretext must be

evaluated by "look[ing] at the facts as they appear to the person making the decision to terminate plaintiff," the district court concluded that any factual disputes concerning the Friday conversation were immaterial because Ms. Edgar correctly applied BCI's policy concerning insubordination to the facts as she understood them. Mem. Op. & Order 24-25, 2004 U.S. Dist. LEXIS at *39-40. The district court found the termination letter ("You did not report to work on Sunday 9-30-01, therefore your employment [is] being terminated for insubordination") "consistent" with Ms. Edgar's declaration that the sole act of insubordination for which he was terminated was his conduct during the call on Friday. *Id.* at 26. According to the district court, the phone call and the failure to come to work formed part of the same "chain of events," and no reasonable jury could find that BCI's explanations were shifting or inconsistent.

In evaluating the EEOC's "rubber stamp" or "cat's paw" claim, the district court acknowledged that the EEOC had raised a genuine issue of fact as to whether Mr. Grado harbored racial bias against African Americans. It noted, however, that other circuits' "rubber stamp" cases "involved situations in which a decision-maker accepted the *recommendations* of a biased supervisor without conducting an independent investigation." *Id.* at 29 (emphasis in original). Here, Mr. Grado never officially recommended that Mr. Peters be terminated; he merely provided information to Ms. Edgar, who made the final decision. Also, according to the district court, Ms. Edgar *did* conduct an independent investigation: she asked Ms. Pederson to pull Mr. Peters' personnel file. The issue of Mr. Grado's bias therefore was not material.

The district court granted BCI's motion for summary judgment, and the EEOC now appeals. We review the

district court's decision *de novo*, viewing the evidence in the light most favorable to the EEOC and drawing all reasonable inferences in its favor. *Fuerschbach v. S.W. Airlines Co.*, 439 F.3d 1197, 1207 (10th Cir. 2006). We will affirm "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and BCI is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

II. Discussion

Under the *McDonnell Douglas* framework, a plaintiff bears the initial burden of establishing a prima facie case of racial discrimination, which "consists of a showing that (1) the plaintiff belongs to some protected class, (2) the plaintiff was qualified for the position or benefit at issue, (3) the plaintiff suffered an adverse employment action, and (4) the plaintiff was treated less favorably than others (e.g., the position at issue remained open after the adverse employment action)." *Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1134 (10th Cir. 2004). BCI concedes that the EEOC has established a prima facie case here: Mr. Peters is black, he was qualified for his job as a merchandiser, he was terminated, and the position remained open.

The burden therefore shifts to BCI to articulate a legitimate, nondiscriminatory reason for the employment action. *Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1308 (10th Cir. 2005). The EEOC concedes that BCI has articulated a nondiscriminatory reason for its termination of Mr. Peters: his insubordination on Friday, September 28 during the phone conversation with Mr. Grado. Significantly, BCI maintains that Mr. Peters' absence on Sunday, September 30 had nothing to do with the decision, except insofar as it

confirmed that Mr. Peters' statements on Friday were insubordinate. App. 27 ("Mr. Peters was not terminated because he did not show up for work on Sunday....").

The sole issue on appeal is whether the EEOC has made a sufficient showing that BCI's proffered explanation is a pretext for race discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Here, it is undisputed that Ms. Edgar, who formally made the termination decision, worked in a different city and had no idea that Mr. Peters is black. She therefore could not have acted for racially discriminatory reasons. For the EEOC to prevail, it must make not only a factual showing that Mr. Grado harbored racial animus toward black employees, but also a convincing legal claim that his racial animus should be imputed to BCI despite the fact that Mr. Grado had no power to terminate anyone.

A. Subordinate Bias Liability

Other courts have recognized claims under Title VII based on the bias of a subordinate, often using the terms "cat's paw" or "rubber stamp" to describe the theory. The "cat's paw" doctrine derives its name from a fable, made famous by La Fontaine, in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. *See* Fables of La Fontaine 344 (Walter Thornbury trans., Chartwell Books 1984). As the cat scoops the chestnuts from the fire one by one, burning his paw in the process, the monkey eagerly gobbles them up, leaving none left for the cat. *Id.* Today the term "cat's-paw" refers to "one used by another to accomplish his purposes." Webster's Third New International Dictionary Unabridged 354 (2002). In the employment discrimination context, "cat's paw" refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker

as a dupe in a deliberate scheme to trigger a discriminatory employment action. *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998). The "rubber stamp" doctrine has a more obvious etymology, and refers to a situation in which a decisionmaker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 288 (4th Cir. 2004) (en banc). Our sister circuits overwhelmingly have endorsed some version of these doctrines. *See Galdamez v. Potter*, 415 F.3d 1015, 1026 n.9 (9th Cir. 2005); *Hill*, 354 F.3d at 290; *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999); *Griffin v. Wash. Convention Ctr.*, 330 U.S. App. D.C. 81, 142 F.3d 1308, 1311-12 (D.C. Cir. 1998); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1213-14 (3d Cir. 1995); *Stacks v. S.W. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir. 1994); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (Posner, J.) (inaugurating the descriptor "cat's-paw" for this category of claim).

Although this Court has not yet had occasion to find for a plaintiff on a subordinate bias claim, we have strongly signaled our endorsement of the theory. We have stated that "under certain circumstances, a defendant may be held liable for a subordinate employee's prejudice even if the manager lacked discriminatory intent." *English v. Colo. Dep't of Corrs.*, 248 F.3d 1002, 1011 (10th Cir. 2001). Specifically, we have described a "rubber stamp" theory of liability, noting that "[t]o recover under this theory, the plaintiff must show 'that the decisionmaker followed the biased recommendation [of a subordinate] without independently investigating the complaint against the employee.'" *Id.* (quoting *Stimpson*, 186

F.3d at 1332) (alteration in original). Twice we have held that a plaintiff could not prevail because the decisionmaker had conducted an independent investigation of the facts, rather than relying entirely on the recommendation of the biased subordinate. *See Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231-32 (10th Cir. 2000) (finding it "[i]mportant[]" that "in the course of his investigation" the decisionmaker asked the employee "to give his version of the exchange," but the employee declined to do so); *English*, 248 F.3d at 1011 (noting that the decisionmaker met twice with the employee and his attorney, and specifically asked for evidence rebutting or mitigating the findings of the allegedly biased subordinates). But we have described the plaintiffs' underlying theory of liability as "correct." *English*, 248 F.3d at 1011.

These subordinate bias theories comport with the basic agency principles incorporated by statute into Title VII. For purposes of Title VII, the term "employer" includes not only any "person engaged in an industry affecting commerce" but "any agent of such a person." 42 U.S.C. § 2000e(b). Although that language "surely evinces an intent to place some limits on the acts of employees for which employers are to be held responsible," *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), employers may be vicariously liable for the actions of their employees -- even intentional torts outside the scope of their employment -- if the employee "'was aided in accomplishing the tort by the existence of the agency relation,'" *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 758, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) (quoting Restatement (Second) of Agency § 219(2)(d) (1958) [hereinafter Restatement]). In *Ellerth*, which involved a hostile work environment claim, the Supreme Court held that "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of

the employer." *Id.* at 762. Citing with approval the seminal "cat's paw" opinion by Judge Posner, the Court seemed unconcerned with the possibility that the "tangible employment decision[]" might "be subject to review by higher level supervisors." *Id.* (citing *Shager*, 913 F.2d at 405). The "aided by the agency relation" standard applies even more clearly to subordinate bias claims, such as "cat's paw" or "rubber stamp" claims, because the allegedly biased subordinate accomplishes his discriminatory goals by misusing the authority granted to him by the employer -- for example, the authority to monitor performance, report disciplinary infractions, and recommend employment actions. *See* Restatement § 219(2) cmt. e (explaining that the "aided by the agency relation" standard applies in situations where "the servant may be able to cause harm because of his position"); *cf. Faragher v. City of Boca Raton*, 524 U.S. 775, 802-05, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (contemplating vicarious liability based on abuse of authority by supervisors, but emphasizing that the "aid" in the "aided by the agency relation" formula must amount to more than access to a pool of potential victims and "the unspoken suggestion of retaliation").

Holding employers accountable for the actions of biased subordinates also advances the purposes of Title VII. It should go without saying that a company's organizational chart does not always accurately reflect its decisionmaking process. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151-52, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (finding that the bias of a supervisor, the husband of the formal decisionmaker, could be imputed to the company because the supervisor "was the actual decisionmaker" and was "principally responsible for petitioner's firing"); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) (noting that "courts will not blindly accept the titular

decisionmaker as the true decisionmaker"). A biased low-level supervisor with no disciplinary authority might effectuate the termination of an employee from a protected class by recommending discharge or by selectively reporting or even fabricating information in communications with the formal decisionmaker. Recognition of subordinate bias claims forecloses a strategic option for employers who might seek to evade liability, even in the face of rampant race discrimination among subordinates, through willful blindness as to the source of reports and recommendations. *Id.* n.13 (holding that employers may not insulate themselves from Title VII claims simply "by ensuring that the one who performed the employment action was isolated from the employee"). Indeed, such claims have the salutary effect of encouraging employers to verify information and review recommendations before taking adverse employment actions against members of protected groups -- particularly if, as we have held, an employer can escape liability entirely by performing an independent investigation. *See English*, 248 F.3d at 1011. Construing the definition of an "employer" to permit subordinate bias claims therefore serves Title VII's "deterrent purpose." *See Ellerth*, 524 U.S. at 764 (noting that the extent of employer liability under Title VII should not depend exclusively on common-law agency principles, but also should encourage employer procedures that prevent discriminatory actions).

Despite broad support for some theory of subordinate bias liability, our sister circuits have divided as to the level of control a biased subordinate must exert over the employment decision. Some courts take a lenient approach, formulating the inquiry as whether the subordinate "possessed leverage, or exerted influence, over the titular decisionmaker." *See Russell*, 235 F.3d at 227. On this view, "summary judgment generally is improper where the plaintiff can show that an

employee with discriminatory animus provided factual information or other input that may have affected the adverse employment action." *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994) (citing *Shager*, 913 F.2d at 405). This standard apparently contemplates that any "influence," the reporting of any "factual information," or any form of "other input" by a biased subordinate renders the employer liable so long as the subordinate "may have affected" the employment action. Such a weak relationship between the subordinate's actions and the ultimate employment decision improperly eliminates a requirement of causation. *See Ellerth*, 524 U.S. at 745 (construing Title VII "to accommodate the agency principle of vicarious liability for harm *caused by* misuse of supervisory authority" (emphasis added)). When a biased subordinate merely plays a peripheral role, it cannot be said that he has "accomplish[ed]" a tortious act and "cause[d] harm" as required under agency law principles and, accordingly, under Title VII. Restatement § 219(2)(d) & cmt. e; *see also id.* cmt. a ("Rationale of liability") ("The assumption of control is a usual basis for imposing tort liability when the thing controlled causes harm."). Moreover, a lenient "may have affected" standard that punishes employers for any "input" -- no matter how minor -- weakens the deterrent effect of subordinate bias claims by imposing liability even where an employer has diligently conducted an independent investigation.

At the opposite extreme, the Fourth Circuit has held that an employer cannot be held liable even if a biased subordinate exercises "substantial influence" or plays a "significant" role in the employment decision. *Hill*, 354 F.3d at 291. Taking its cue from the Supreme Court's statements in *Reeves* that "petitioner [had] introduced evidence that [the supervisor] was the actual decisionmaker" and was "principally

responsible" for his firing, *Reeves*, 530 U.S. at 151-52, the Fourth Circuit held that these formulations mark "the outer contours of who may be considered a decisionmaker for purposes of imposing liability upon an employer." *Hill*, 354 F.3d at 289. On this view, the decisionmaker must be a "cat's paw" so completely beholden to the subordinate "that the subordinate is the actual decisionmaker." *Id.* at 290. The Fourth Circuit's strict approach makes too much of the phrase "actual decisionmaker" in *Reeves*; the Court was describing what the petitioner's evidence showed, not prescribing the "outer contours" of liability. *See Reeves*, 530 U.S. at 151-52 (using the phrases "actual decisionmaker" and "principally responsible" only in Part III.B, which begins, "Applying this standard here..."). The Fourth Circuit's peculiar focus on "who is a 'decisionmaker' for purposes of discrimination actions," *Hill*, 354 F.3d at 286, seems misplaced. The word "decisionmaker" appears nowhere in Title VII. Instead, the statute imposes liability for discrimination by employers and their agents, 42 U.S.C. § 2000e(b), which in accordance with agency law principles includes not only "decisionmakers" but other agents whose actions, aided by the agency relation, cause injury. *Ellerth*, 524 U.S. at 760. The Fourth Circuit's standard also undermines the deterrent effect of subordinate bias claims, allowing employers to escape liability even when a subordinate's discrimination is the sole cause of an adverse employment action, on the theory that the subordinate did not exercise complete control over the decisionmaker.

We find ourselves in agreement with the Seventh Circuit, which has rejected the Fourth Circuit's approach as "inconsistent with the normal analysis of causal issues in tort litigation." *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004). To prevail on a subordinate bias claim, a plaintiff must establish more than mere "influence" or "input" in the decisionmaking process. Rather, the issue is whether the

biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action. *Id.* This standard comports with the agency law principles that animate the statutory definition of an "employer." *See* Restatement § 219 (describing the scope of a master's liability "for the torts of his servants" and thereby incorporating standard tort concepts like causation). Both the Supreme Court and this Court require a comparable causal connection as part of analogous workplace discrimination claims. *See, e.g., Clark County School Dist. v. Breeden*, 532 U.S. 268, 272, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (requiring a "causal connection" between the plaintiff's protected activities and the adverse employment action in a Title VII retaliation claim); *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1457 (10th Cir. 1994) (requiring a "causal nexus" between allegedly discriminatory workplace statements and the termination decision in an ADEA claim). We reaffirm our earlier decisions holding that, because a plaintiff must demonstrate that the actions of the biased subordinate caused the employment action, an employer can avoid liability by conducting an independent investigation of the allegations against an employee. *English*, 248 F.3d at 1011. In that event, the employer has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated. Indeed, under our precedent, simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory. *Kendrick*, 220 F.3d at 1231-32. Employers therefore have a powerful incentive to hear both sides of the story before taking an adverse employment action against a member of a protected class.

Finally, we address the district court's conclusion that an employer may be liable on a subordinate bias theory only if the decisionmaker receives and approves an explicit

recommendation to terminate an employee. Regrettably, subordinate bias cases have suffered from an abundance of vivid metaphors. The Fourth Circuit, for example, seems to have taken the "cat's paw" metaphor too literally in deriving its total-control-over-the-actual-decision standard. *Lust*, 383 F.3d at 584. Likewise, the district court in this case seems to have taken the "rubber stamp" metaphor too literally, requiring that an explicit recommendation must cross the desk of the decisionmaker, regardless of whether the subordinate's discriminatory actions in fact caused the termination. That limitation of subordinate bias claims not only runs counter to the fairly broad "aided by the agency relation" principle embodied in Title VII, but would leave employees unprotected so long as a subordinate stops short of mouthing the words "you should fire him," in person or on paper, to the decisionmaker. Stripped of their metaphors, subordinate bias claims simply recognize that many companies separate the decisionmaking function from the investigation and reporting functions, and that racial bias can taint any of those functions. We see no reason to limit subordinate bias liability to situations that closely resemble the "cat's paw," "rubber stamp," "conduit," "vehicle," or other metaphors that imaginative lawyers and judges have developed to describe such claims.

With these principles in mind, we turn to BCI's decision to terminate Mr. Peters.

B. The Subordinate Bias Claim in this Case

The EEOC argues that BCI's proffered explanation for its termination decision is pretextual. To survive summary judgment on a subordinate bias theory, the plaintiff must first establish a genuine issue of material fact concerning the bias of the subordinate. It must then establish genuine issues of

material fact as to whether the proffered reason for the employment action is pretextual, which in a subordinate bias claim requires the plaintiff to demonstrate a causal relationship between the subordinate's actions and the employment decision.

1. Mr. Grado's Racial Bias

The district court held, and we agree, that the EEOC has raised a genuine issue of fact concerning Mr. Grado's racial animus. In general, "isolated racial comments" are insufficient to establish pretext unless they "can somehow be tied to the employment actions disputed in the case at hand." *Stewart v. Adolph Coors Co.*, 217 F.3d 1285, 1289 (10th Cir. 2000) (internal quotation marks omitted). Nonetheless, at the summary judgment stage "all rational inferences from the evidence must be made in favor of the party opposing the summary judgment motion." *Ortiz v. Norton*, 254 F.3d 889, 896 (10th Cir. 2001). In *Ortiz*, we held that evidence of discrimination in employment decisions affecting other workers "could support an inference that the decision makers harbored a bias against Hispanics which might have affected other decisions, including the decisions adverse to plaintiff." *Id.* A plaintiff also "may show pretext 'by providing evidence that he was treated differently from other similarly situated, nonprotected employees who violated work rules of comparable seriousness,'" provided the "similarly situated" employee shares the same supervisor, is subject to the same performance standards, and otherwise faces comparable "relevant employment circumstances." *Green v. New Mexico*, 420 F.3d 1189, 1194 (10th Cir. 2005) (quoting *Kendrick*, 220 F.3d at 1232).

In this case, the EEOC has produced sufficient evidence to create a jury question concerning Mr. Grado's racial

animus. Mr. Wilson claims that Mr. Grado directed "many race-based remarks," and offered three examples of racial jokes and put-downs. App. 184-85. In his affidavit, Mr. Katt says that Mr. Grado may have used a racial epithet to describe Mr. Peters in the immediate aftermath of the termination and lawsuit.[2] *Id.* at 212. These comments may have been infrequent, but they certainly were not "isolated": they were directed at other black merchandisers under Mr. Grado's supervision, suggesting a pattern of racial bias in disciplinary matters that could have affected Mr. Grado's conduct with respect to Mr. Peters' termination, and in one case concerned Mr. Peters himself.

In addition, three other merchandisers -- two black and one Hispanic -- submitted affidavits giving specific examples of Mr. Grado's disparate treatment of black and Hispanic merchandisers. Mr. Young claims that Mr. Grado "nit-pick[ed] my work" and "constantly threatened to change my

---

[2] BCI argues, in a footnote and without elaboration, that Mr. Katt's testimony on this point "is clearly inadmissible pursuant to Federal Rules of Evidence 602 and 403," and therefore should be ignored. Br. of Appellee 41 n.17. The first objection is obviously wrong. Rule 602 requires that a witness must have "personal knowledge of the matter" before testifying, but Mr. Katt's affidavit recounts a conversation he personally conducted with Mr. Grado. The second objection is difficult to discern. Rule 403 provides that evidence "may be excluded" if, in the view of the district court, "its probative value is substantially outweighed by the danger of unfair prejudice." If credited, Mr. Katt's testimony about a racial slur directed at Mr. Peters shortly after his termination is at least probative of Mr. Grado's ~~motive at the~~ time of the termination. Like the district court, which considered the testimony, *see* Mem. Op. & Order, 2004 U.S. Dist. LEXIS at *22, we are not inclined to ignore the testimony as unduly prejudicial at this stage.

days off and to change my route," but "did not... treat non-African American employees in this manner." App. 181. He recalls being threatened with a schedule change for leaving the back room of one of his stores "a bit messy," while Mr. Grado tolerated a non-black merchandiser's "very messy" back room "many times." *Id.* Mr. Esquibel named six Hispanic employees who were not fired after disobeying company directives. *Id.* at 183. Mr. Wilson says that Mr. Grado was "unusually picky" with black merchandisers, "often calling us back to stores that had been serviced to redo some minor detail, while the Hispanic Merchandisers were not subject to this same level of scrutiny." *Id.* at 185. Broadly, he claims that Mr. Grado "treated Hispanic Merchandisers with respect" but "continually demeaned me and threatened to replace me." *Id.*

Most importantly, the EEOC produced evidence of Mr. Grado's unfazed response to the incident involving a Hispanic merchandiser, Ms. Lovato. Like Mr. Peters, Ms. Lovato reported to Mr. Grado and was directed to work one of her days off. Like Mr. Peters, she failed to come to work, in direct violation of her instructions and in spite of considerable efforts by Mr. Katt to come to accommodate her schedule. Unlike Mr. Peters, who was fired two days later, Ms. Lovato received no discipline whatsoever as a result of the incident, with Mr. Grado reportedly saying, "You can't make somebody work one of their days off." *Id.* at 211. To be sure, there are factual differences between these incidents: Ms. Lovato received all of her orders through Mr. Katt whereas Mr. Peters spoke to Mr. Grado directly, and Ms. Lovato initially acquiesced in the orders (before disobeying them) whereas, according to Mr. Grado, Mr. Peters initially behaved in a defiant manner and announced an intention to disobey the orders (before being excused from work). They are similar enough, however, that in light of the dramatic

difference between Mr. Grado's actions in each case, as well as the other evidence of discriminatory conduct, a reasonable jury could find the situations comparable and infer that racial animus played a role in Mr. Peters' treatment.

We do not necessarily believe that each of the incidents recounted above would support a charge of discrimination in isolation, but taken as a whole, this evidence of racial comments and disparate treatment of black merchandisers creates a genuine issue of fact regarding Mr. Grado's racial bias.

2. Pretext and Causation

To show that an employer's proffered nondiscriminatory reason for an employment action is pretextual, a plaintiff must produce evidence of "'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.'" *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997) (quoting *Olson v. GE Astrospace*, 101 F.3d 947, 951-52 (3d Cir. 1996)). Because the EEOC's pretext argument depends in part on a subordinate bias theory, it must establish a genuine issue of material fact as to whether Mr. Grado's bias translated into discriminatory actions that caused Mr. Peters' termination.

BCI now maintains that it fired Mr. Peters solely because of his defiant conduct on the phone with Mr. Grado on Friday, and that "Mr. Peters was not terminated because he did not show up for work on Sunday, except to the extent this conduct is viewed... as the fulfillment of [his] stated intention to defy a direct order from Mr. Grado." App. 27. On this

theory, missing work on Sunday merely confirmed that Mr. Peters' statements on Friday were insubordinate, and did not serve as a basis for dismissal. Yet the first explanation provided by Mr. Grado at the Tuesday morning meeting was, "You've been terminated for insubordination, *for not showing up for work*." *Id.* at 193 (emphasis added). The Disciplinary Status Notice unequivocally states that the failure to show up for work on Sunday *was* the act of insubordination: "You did not report to work on Sunday 9-30-01, therefore your employment in [sic] being terminated for insubordination." *Id.* at 41. That document lists Sunday, not Friday, as the date of the violation that prompted the termination, indicating that the act of insubordination was the failure to come into work, not Mr. Peters' attitude during the earlier phone call. Indeed, on October 16, 2001, just two weeks after the termination, Ms. Pederson filed paperwork with the New Mexico Department of Labor stating that "Stephen was told by Cesar Grado that *if he didn't show up*, it would be considered insubordination." *Id.* at 165 (emphasis added). When asked to describe the "final incident that caused the discharge," Ms. Pederson wrote, "Stephen did not show up for work on 9/30." *Id.* Only later did BCI characterize its decision to fire Mr. Peters as hinging on his defiant conduct over the phone, rather than on his absence.

A jury might reasonably conclude that BCI's original explanation, that Mr. Peters was fired because he failed to show up for work on Sunday, was pretextual because Mr. Peters was excused from work that day. Mr. Peters was in fact sick, had visited an urgent care clinic, and had been diagnosed with a sinus infection and directed not to work until Monday. He phoned Mr. Katt to report the illness, and was excused from work--an interaction that BCI concedes is perfectly ordinary between merchandisers and account managers. A jury could credit Ms. Edgar's statements that

she knew that Mr. Peters' absence was excused and nonetheless (incorrectly, as it turns out) deemed Mr. Peters' "alleged sickness" suspicious under the circumstances. But it might just as easily credit Mr. Katt's testimony, rather than Ms. Edgar's, and conclude that neither Mr. Grado nor Ms. Edgar learned that Mr. Peters called in sick until the scheduling discussion between Mr. Katt and Mr. Grado on Monday evening, after Ms. Edgar claims she had already made the decision to fire Mr. Peters. The affidavits of Mr. Katt and Mr. Peters state that key players in the decision fell silent upon hearing that Mr. Peters' absence was excused, suggesting that they were indeed surprised by the news.

Recognizing the weakness of the original explanation, BCI has refined its position by relying entirely on Mr. Peters' purported insubordination in his conversation with Mr. Grado on Friday. A jury could conclude, however, that this reason too is a pretext for race discrimination, as the result of Mr. Grado's racial animus. It is undisputed that Ms. Edgar, and Ms. Edgar alone, made the formal termination decision. Mr. Grado has succinctly described his role in the disciplinary process: "I gather the facts and I present them to our HR department, and they decide whether it is an insubordination or not and whether there's action to be taken or not." App. 63. Surely Ms. Edgar harbored no ill will toward Mr. Peters on account of his race, because she worked in Phoenix and did not even know that he was black. Yet it is also undisputed that Ms. Edgar relied exclusively on Mr. Grado's account of the Friday phone conversation in making her decision. She conducted no independent inquiry into the events that took place that Friday, and failed to take even the basic step -- cited by this Court in *Kendrick*, 220 F.3d at 1231-32 -- of asking Mr. Peters for his side of the story. Accordingly, Mr. Grado's report that Mr. Peters had behaved in a defiant, insubordinate manner on Friday caused the

termination. If the jury concludes that Mr. Grado's report was tainted by race discrimination -- as it might, for the reasons explained above -- it could also find that the proffered reason for firing Mr. Peters, which rests entirely on that report, is pretextual.

BCI argues that any factual disputes concerning the Friday conversation between Mr. Grado and Mr. Peters are immaterial because both parties agree that Mr. Peters ended the conversation by saying, "[D]o what [you] got to do and I'll do what I got to do." App. 58. We agree that this statement can only be interpreted as defiance, and if Mr. Grado had reported nothing but this closing remark to Ms. Edgar, there would be no reason to believe that racial bias on the part of Mr. Grado caused the termination. Yet Mr. Grado reported several additional facts about his conversations on Friday afternoon. First, he told Ms. Edgar that he had learned, through Mr. Katt, that Mr. Peters was already planning to call in sick two days later, in violation of company policy. Second, he reported that in their phone call Friday afternoon, he asked Mr. Peters to describe his plans, affording an opportunity for Mr. Peters to explain his scheduling conflict. Third, he reported that Mr. Peters angrily replied that it was "none of [your] business," and was "yelling" during the discussion. *Id.* at 36, 65.

All of those facts are disputed. Instead of crediting Mr. Grado's testimony, a jury might believe Mr. Katt, who says that he never told Mr. Grado that Mr. Peters had advance plans to call in sick on Sunday, or Mr. Peters, who says that he simply told Mr. Grado that he had been feeling sick that week, not that he planned to violate company policy. A jury might also credit Mr. Peters' version of the Friday afternoon conversation, in which Mr. Grado never bothered to ask Mr. Peters' reasons, Mr. Peters never refused to answer Mr.

Grado's questions, and Mr. Peters remained calm throughout the discussion. There is good reason to believe that Ms. Edgar acted on those additional facts, not just on Mr. Peters' "do what you have to do" remark. She denounced Mr. Peters' advance plans to call in sick as "not acceptable," an abuse of the company sick leave policy. *Id.* at 23. Also, it was Ms. Edgar who originally insisted that Mr. Grado "find out what the situation was" and determine whether Mr. Peters had a "compelling reason" he could not come to work, which suggests that she found that information important in making her decision. *Id.* at 23. Taking the evidence in the light most favorable to the EEOC, it is easy to imagine that the additional details of Mr. Grado's account, in which Mr. Peters appeared to be fabricating his illness, started yelling at his supervisor, and refused to answer questions, led Ms. Edgar to characterize the conversation as "insubordination" warranting dismissal. The question is not whether Ms. Edgar *could have* terminated Mr. Peters because of his closing remark alone, which appears to have been permissible under BCI policy, but what *actually did* cause the adverse employment action. If a jury credits the testimony of Mr. Peters and Mr. Katt, and thus concludes that Mr. Grado lied to Ms. Edgar, it could also find that the additional claims about Mr. Peters' conduct caused the termination.

Finally, BCI argues, and the district court agreed, that Ms. Edgar did not rely solely on Mr. Grado but conducted an independent investigation. This investigation consisted of exactly one action: directing Ms. Pederson to pull Mr. Peters' personnel file. We find this "investigation" inadequate, as a matter of law, to defeat the inference that Mr. Grado's racial bias tainted the decision. Obviously the file contained no information about the recent incident involving Mr. Grado, so it is difficult to see how reading it could "independently" confirm what had happened. True, the

file contained a description of a 1999 incident of insubordination, which (despite its ignoble back story) seemed consistent with Mr. Grado's version of events. The problem is that Ms. Edgar never sought any other version of events, and therefore had no reason other than Mr. Grado's report to believe that the file was relevant. Simply pulling the file therefore does not constitute an independent investigation, and a jury could conclude that Mr. Grado's factually disputed report -- the sole source of information on which Ms. Edgar relied -- caused the termination.

Because the EEOC has established genuine issues of material fact as to whether the nondiscriminatory reasons offered by BCI are pretextual, summary judgment was inappropriate.

III. Conclusion

We **REVERSE** the judgment of the district court and **REMAND** the case for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 02-1644JB/RHS

[Filed June 10, 2004]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff*,	)
v.	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, doing business as Phoenix Coca-Cola Bottling Company; COCA-COLA BOTTLING COMPANY OF ALBUQUERQUE, *Defendants*.	)

MEMORANDUM OPINION AND ORDER

BEFORE: James O. Browning, UNITED STATES DISTRICT JUDGE.

THIS MATTER comes before the Court on the Defendant's Motion for Summary Judgment, filed February

19, 2004 (Doc. 65). The primary issue is whether the Plaintiff Equal Employment Opportunity Commission ("EEOC") has demonstrated that there is a genuine issue of material fact whether Defendant BCI Coca-Cola Bottling Company of Los Angeles ("BCI") terminated Stephen Peters from his employment because he is African American. Because the Court finds that the EEOC has not established a genuine issue of material fact, it will grant BCI's Motion for Summary Judgment and dismiss the EEOC's claims.

FACTUAL BACKGROUND

BCI is a wholly owned subsidiary of Coca-Cola Enterprises, Inc., the world's largest bottler of Coca-Cola® products. *See* Declaration of Patricia K. Edgar ¶ 2, at 1-2 (executed February 2, 2004). BCI does business in Albuquerque as the Coca-Cola Bottling Company of Albuquerque. *See id.* Peters worked as a merchandiser in the Albuquerque facility under the supervision of Cesar Grado, a District Sales Manager. *See* Declaration of Cesar Grado ¶¶ 1, 5, at 1-2 (executed February 3, 2004).

Merchandisers are hourly employees whose job duties include product placement and cleaning, arranging, and rotation of displays and promotional materials in retail grocery or other outlets. *See id.* ¶ 2, at 1. Peters was one of six merchandisers working under Grado's supervision. *See id.* Grado also supervised two account sales representatives or "account managers." *See id.*

Account managers are salaried sales employees responsible for selling Coca-Cola products to accounts. *See id.* At all relevant times, Jeff Katt was an account manager under Grado's supervision. *See id.* ¶ 7, at 3. According to Peters, Katt supervised his day-to-day work activities. *See*

Affidavit of Stephen Peters ¶ 9, at 2 (executed March 17, 2004).

Grado was responsible for scheduling merchandisers to cover all accounts in his territory. *See* Grado Decl. ¶ 2, at 1. Merchandisers work five days each week with two days off. *See id.* ¶ 3, at 2. Because BCI services its accounts seven days a week, none of the merchandisers had the same two days off. *See id.*

Grado occasionally required merchandisers to work on their scheduled days off to provide extra coverage for routes during particularly busy times and/or when other employees are absent. *See id.* ¶ 4, at 2. An example of a busy time requiring additional coverage would be when one or more accounts is running an "ad" that is offering special prices on Coca-Cola products which results in increased volume of sales and thus requires more frequent deliveries. *Id.* When Grado needed extra help covering routes, he first requested volunteers and then asked merchandisers to come in on their days off on a rotating basis. *See id.* Peters disputes that Grado used this method to find coverage for routes. *See* Peters Aff. ¶ 15, at 2-3 ("Mr. Grado just picked people to work.").

Because Peters was the most senior merchandiser under Grado's supervision, he had Saturday and Sunday as his scheduled days off. *See* Grado Decl. ¶ 5, at 2. During the first nine months of 2001, Peters worked on his days off on 8 occasions, including three Sundays and five Saturdays. *See id.* During the same 34-week period, merchandiser Frank Ortiz (Hispanic) worked on his scheduled days off 12 times, merchandiser Donald Connor (white) worked on his scheduled days off 10 times, merchandiser Arturo Lopez (Hispanic) worked on his scheduled days off 9 times, and a

later hire, merchandiser Robert Espinosa (Hispanic), worked on his scheduled days off 7 times in 21 weeks. *See id.*

According to Peters, he never received a written reprimand for job performance problems or attendance problems during his employment with BCI. *See* Peters Aff. ¶ 1, at 1. Peters states that he was considered a "good merchandiser" and was awarded a certificate for his five years of "service, dedication and commitment" to the company. *Id.* ¶¶ 2-3, at 1. Peters' personnel file indicates, however, that Peters' supervisor gave him a final warning for an act of insubordination which involved refusing to work on a scheduled day off. *See* Disciplinary Status Notice (September 17, 1999).

Grado was responsible for monitoring the employees working under his supervision, and when an employee had an attendance, performance, and/or disciplinary issue, he was responsible for bringing the issue to the attention of the BCI Human Resources Department. *See* Grado Decl. ¶ 6, at 3. The Human Resources representative would then make a decision about which workplace policy, if any, applied to the situation and the appropriate action to take based upon what had occurred. *See id.*; Deposition of Cesar Grado at 31:24 to 32:3 (taken December 3, 2003); Deposition of Sherry Pedersen at 30:19 to 31:4 (taken December 4, 2003).

The top-ranking BCI Human Resources representative at the Albuquerque facility during the relevant period was Senior Human Resources Administrator Sherry Pedersen. *See* Declaration of Sherry Pedersen ¶ 1, at 1 (executed February 3, 2004). With the exception of terminations, Pedersen authorized all disciplinary actions with respect to employees at the Albuquerque facility. *See id.* ¶ 2, at 1-2. Patricia Edgar, who was the Employee Relations Manager for BCI at

all relevant times, had to authorize all terminations. *See id.*; Edgar Decl. ¶ 3, at 2. Edgar's office was based in Phoenix, Arizona and her responsibilities included overseeing human resource functions at BCI facilities in multiple states. *See* Edgar Decl. ¶ 1, at 1. At all relevant times, Pedersen reported directly to Edgar. *See id.*; Pedersen Decl. ¶ 1, at 1.

BCI contends that Grado did not have authority to discipline or terminate employees working under his supervision. *See* Grado Decl. ¶ 6, at 3. Peters contends that Grado gave employees the impression that he had the authority to fire employees. *See* Deposition of Jeff Katt at 71:21 to 72:13 (taken March 8, 2004); Affidavit of Michael Wilson ¶ 8, at 2-3 (executed March 12, 2004). When BCI terminated Peters' employment, Katt assumed that Grado was the one who had made the decision. *See* Katt Depo. at 70:24 to 71:4.

In addressing employee disciplinary issues, BCI Human Resources personnel consult written policies setting forth workplace rules and regulations, which are divided into three categories according to the severity of the infraction. *See* Pedersen Decl. ¶ 3, at 2. Group A violations address the most serious workplace issues, such as insubordination, and are sufficient to result in immediate discharge, although discharge is not a mandatory result. *See id.* Group B and C violations, on the other hand, are generally dealt with according to a progressive discipline policy, depending on the nature of the infraction. *See id.* Group C includes the lowest level violations, including attendance issues. *See id.* "No call/no show" violations, which occur when an employee fails to report for a scheduled shift without notifying his or her immediate supervisor in accordance with BCI policy, are handled under a separate written policy and are not a basis for immediate termination. *Id.* BCI contends that Human

Resources personnel retain discretion in applying these rules and policies, as BCI must assess each situation on an individualized basis. *See id.*

BCI Human Resources personnel uses a very specific and narrow definition of the term insubordination.

> Insubordination does not mean a situation where an employee has failed to carry out normal job responsibilities or failed to meet performance expectations. Nor is insubordination simply failing or even refusing to follow a supervisor's instructions. Rather, insubordination occurs when the employee knows that he is considered to be defying a direct order of the supervisor and that his conduct could lead to termination.

Edgar Decl. ¶ 9, at 4. Peters disputes this definition, because he contends that BCI's policy does not define insubordination. Peters also contends that there is inconsistent testimony about what constitutes insubordination. Donald Bateluna, Grado's supervisor, testified that insubordination occurs when an employee fails to follow a direct order after being warned that failure to obey can be considered insubordination. *See* Deposition of Donald R. Bateluna at 47: 8-19 (taken January 29, 2004). Bateluna also testified that insubordination occurs when the employee follows through with his or her refusal to perform the act a supervisor has ordered him or her to do, not when the employee refuses to obey. *See id.* at 48:25 to 49:9.

During the weekend of Saturday, September 29, 2001, and Sunday, September 30, 2001, three of the chain stores in Grado's area were running ads. *See* Grado Decl. ¶ 7, at 3. Accordingly, Grado needed extra merchandisers to service the accounts. One of the merchandisers, Joseph Rivera, had

previously told Grado that he had a commitment which prevented him from coming in on Sunday, September 30, 2001. *See id.* Grado asked Katt, to relay a message to Peters that Grado needed him to work on one of his days off that weekend. *See id.*; Katt Depo. at 40:10-14. Katt told Grado that he did not believe Peters would be willing to work on Sunday. *See* Grado Decl. ¶ 7, at 4; Katt Depo. at 40:20-21 ("He's not going to work six days this week."). It is Grado's recollection that Katt told him he believed Peters was going to call in sick that weekend. *See* Grado Decl. ¶ 7, at 4.

Peters asserts that he never told Katt that he planned to call in sick. *See* Peters Aff. ¶ 25, at 4. Peters had worked all his scheduled days that week and had not been out sick. *See* Grado Decl. ¶ 7, at 4. Peters had not, however, been feeling well all week; Peters' plans were to go out of town for the weekend, but because he had not been feeling well, he was going to go to the doctor and postpone his travel plans. *See* Deposition of Stephen Brian Peters at 122:12-25 (taken December 2, 2003).

On Friday, September 28, 2001, Grado learned that one of the "floater" merchandisers, Damian Mirabal, had suffered an on-the-job injury and could not return to work for a week. *See* Grado Decl. ¶ 7, at 3. Mirabal typically covered Peters' routes on Peters' scheduled days off. *See id.* ¶ 7, at 4. The remaining merchandisers were already scheduled to work that weekend, except Rivera, who was unavailable, and so Grado was now a person short and had no one left to bring in except Peters. *See id.* Grado claims that he checked with other District Sales Managers to see if they had anyone available to help him, but they did not. *See id.*

Based on his conversation with Katt, Grado understood around mid-day on Friday, September 28, that he was going

to have to require Peters to come in to work that weekend, so he decided to seek advice from the BCI Human Resources Department. *See id.* ¶ 8, at 4. Ordinarily, Grado would have spoken with Pedersen regarding the situation, but she was out of the office, and so he called Edgar in Phoenix. *See id.* Grado explained to Edgar that he needed Peters to work on his day off that weekend because of a high volume work situation and a manpower shortage, and asked whether he could order Peters to come in to work. *See id.*; Edgar Decl. ¶ 4, at 2. Edgar asked Grado if he had looked into every other way of getting the routes covered, and he said he had. *See* Grado ¶ 8, at 4.

Edgar told Grado he could require Peters to come in to work. *See* Grado Decl. ¶ 8, at 4; Edgar Decl. ¶ 5, at 3. Edgar asked Grado if there were some compelling reason Peters could not come in to work, and Grado told her that he had not spoken with Peters yet, but had heard he was going to call in sick. *See* Edgar Decl. ¶ 5, at 3. Edgar told Grado that it was not acceptable for Peters to plan to call in sick two days before his shift. *See id.*[1]

BCI policy requires employees to call in sick to their immediate supervisor at least one-half hour before their regular starting time on each day of absence. *See id.* BCI policy also states that employees do not need to call in on each day of an absence if other arrangements have been

---

[1] Peters objects that Grado's statement -- "but had heard he was going to call in sick" -- is inadmissible hearsay. The Court disagrees. BCI is not offering it for the truth of the statement, but as evidence of what Grado said to Edgar. *See* Fed. R. Evid. 801(c)("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

made. Edgar instructed Grado to call Peters and find out what the situation was. *See* Edgar Decl. ¶ 6, at 3.

Edgar told Grado that, if he encountered resistance from Peters, unless Peters presented some compelling reason why he could not work on the day in question, he needed to explain to Peters that he was being given a direct order to come to work and that failure to comply with the order could be insubordination and could lead to termination. *See* Grado Decl. ¶ 8, at 4; Edgar Decl. ¶ 6, at 3. After Grado got off the telephone with Edgar, he paged Peters, and Peters called him back. *See* Grado Decl. ¶ 9, at 4.

BCI contends that Grado told Peters he needed him to work that weekend, and Peters said he could not work because he had plans. *See id.* ¶ 9, at 4-5; Peters Depo. at 121:1-5. BCI maintains that Grado asked Peters what his plans were, but Peters told Grado that his plans were none of Grado's business. *See* Grado Decl. ¶ 9, at 5. Peters denies that Grado asked him what his plans were. *See* Peters Aff. ¶ 28, at 4. Peters also claims that he told Grado he had not been feeling well all week. *See* Peters Depo. at 121:5-6.

Grado then told Peters: "I'm not asking you to come to work, I'm telling you to come to work. If you do not come to work, it could lead to insubordination and could lead to termination." *Id.* at 121:11-14; Grado Decl. ¶ 9, at 5; Grado Depo. at 259:17-21. Peters responded to Grado's statement by telling Grado: "Do what [you've] got to do, and I'll do what [I've] got to do." Peters Depo. at 121:25 to 122:1; Grado Decl. ¶ 9, at 5. While Peters does not deny that he and Grado made these statements during their telephone conversation, he insists that he was not refusing to work on Sunday, September 30. *See* Peters Aff. ¶ 29, at 4. Peters maintains that his statement to Grado was for the purpose of

ending the conversation with Grado so that it would not become a confrontation. *See id.* ¶ 6, at 2. Peters also asserts that Grado never told him that his conduct during the telephone call was insubordination. *See id.* ¶ 29, at 4.

After he spoke with Peters on Friday afternoon, Grado called Edgar back and told her what had happened. Grado Decl. ¶ 10, at 5; Edgar Decl. ¶ 7, at 3-4. Peters does not dispute that Grado told Edgar these details. At that point, Edgar believed that there was sufficient evidence to find that Peters had committed the offense of insubordination, a Group A offense subject to immediate discharge. *See* Deposition of Patricia K. Edgar at 38:12-17 (taken December 4, 2003). Edgar states that Peters' conduct on Friday, September 28, 2001, standing alone, would have warranted termination under BCI policy. *See* Edgar Decl. ¶¶ 8, 10 at 4.

At that point, Edgar understood that Peters had left for the day, because merchandisers' regular shifts usually end at 2 p.m. *See id.*; Edgar Depo. at 41:20-25. Peters disputes that he left work at 2:00 p.m., because on Friday, September 28, 2001, Peters worked over 11 hours, starting at 5:00 a.m. *See* Peters Aff. ¶ 30, at 4. In any case, Edgar told Grado they would deal with the situation on Monday. *See* Edgar Decl. ¶ 10, at 4-5; Grado Decl. ¶ 10, at 5.

Because, based on his conversation with Peters, Grado believed that Peters would not be coming to work on Sunday, Grado spoke with Katt again on Friday afternoon to make arrangements to cover all the routes on Sunday. *See* Grado Decl. ¶ 11, at 5; Katt Depo. at 28:3:16. Because no merchandisers were available, Grado and Katt planned to cover the routes themselves. *See* Grado Decl. ¶ 11, at 5.

Either Friday afternoon or Monday morning, Edgar spoke with Pedersen about the situation involving Peters. *See* Edgar Decl. ¶ 11, at 5. According to standard practice, Pedersen had reviewed Peters' personnel file after learning of the situation. *See id.*; Pedersen Decl. ¶ 5, at 2-3. At the hearing on this motion, BCI informed the Court that this file was located in the Albuquerque office. *See* Transcript of Motion Hearing at 19:6-19 (April 7, 2004)("Transcript").[2] The EEOC did not dispute that assertion. Pedersen informed Edgar that Peters' personnel file contained a Disciplinary Status Notice related to a previous incident of insubordination in September 1999.[3] BCI stated at the hearing that Pedersen faxed the two page Disciplinary Status Notice to Edgar. *See* Transcript at 19:17-25. The EEOC did not dispute that assertion.

The 1999 incident involved a supervisor, other than Grado, who wrote Peters up for insubordination because he refused to work on a scheduled day off. *See* Disciplinary Status Notice (1999). BCI suspended Peters and issued him a final written warning that further instances of insubordination could lead to termination. *See id.*; Pedersen Decl. ¶ 5, at 2-3. Grado did not supervise Peters in 1999. Peters disputes that he received such a final warning in 1999. Peters Aff. ¶ 5, at 2. BCI contends that Peters' prior similar incident with a different supervisor contributed to Edgar's

---

[2] The Court's citations to the transcript of the hearing refer to the Court Reporter's original, unedited version. Any finalized transcript may contain slightly different page and/or line numbers.

[3] Peters objects to the admissibility of the Disciplinary Status Notice, contending that it is inadmissible hearsay. Again, BCI is not offering the Notice as evidence of the truth about the incident in 1999, but for its influence on Edgar's state of mind.

conclusion that Grado had presented an accurate account of events with respect to Peters' conduct. *See* Edgar Decl. ¶ 11, at 5; Edgar Depo. at 41:6-9.

On Saturday, September 29, 2001, Peters went to a Presbyterian Medical Center clinic because he was still not feeling well. *See* Peters Depo. at 146:4-25. Peters reported to the clinic staff that he was not feeling well, including headache, sinus pain, and fatigue. *See id.* at 148:6-9. The doctor diagnosed a sinus infection and, after Peters told her he had to go to work on Sunday, she told him he was exhausted and overworked. The doctor offered to write Peters an excuse from work, but Peters told her he did not need one unless he missed 2-3 days. The doctor did, however, give Peters a prescription for medication. *See id.* at 149:10-11; *id.* at 151:8-11.

Peters called Katt on Saturday evening to tell him he was sick, he had been to the doctor, and to request permission to stay home on Sunday. Katt gave Peters permission and told Peters to call him if for any reason he felt better in the morning. *See id.* at 194:15 to 195:18. Katt attempted to contact Grado once or twice, but did not get a response back from Grado. *See* Katt Depo. at 25:14-23. Katt testified that, because it was a weekend, it was not unusual for Grado not to call him back. *See id.* Because Peters was not feeling well, he stayed home on Saturday, September 29, 2001 and Sunday, September 30, 2001. *See* Peters Aff. ¶ 7, at 2; Grado Decl. ¶ 12, at 5. After the conversation with Grado on Friday afternoon, Peters had no further communication with Grado until Monday, October 1, 2001. Peters reported for work as scheduled on Monday morning, October 1, 2001. *See* Grado Decl. ¶ 12, at 5.

On Monday, October 1, 2001, Edgar had at least two telephone meetings with Grado and Pedersen to discuss the situation involving Peters. *See* Edgar Decl. ¶ 12, at 5. During these conversations, Grado gave no opinion or recommendation as to what he thought should happen to Peters. *See* Grado Decl. ¶ 13, at 5; Edgar Decl. ¶ 15, at 7.[4] Grado reported that Peters had not come to work on Sunday, September 30, 2001, and had not attempted to contact him. *See* Edgar Decl. ¶ 12, at 5. Edgar asked Grado to check to make sure Peters had not made any attempt to contact him over the weekend. *See id.*; Grado Decl. ¶ 13, at 5. Grado checked and confirmed that Peters had made no attempt to contact him directly, but learned that Peters had called in sick to Katt on Saturday night. *See* Grado Decl. ¶ 13, at 6; Edgar Decl. ¶ 12, at 5-6.

By the end of the day on Monday, October 1, 2001, Edgar made the decision to terminate Peters' employment for insubordination. *See* Edgar Decl. ¶ 13, at 6. Peters disputes that Edgar made the decision. Peters asserts that Grado made the decision to terminate Peters' employment and that Edgar authorized Grado's decision.

Edgar states that her decision was based on several factors, but first and foremost was Peters' conduct towards Grado on Friday, September 28, 2001. *See id.* There was no question in Edgar's mind that Peters had committed the offense of insubordination that day. *See id.* The prior

---

[4] Peters disputes this fact because Edgar stated at her deposition that Grado does have authority to recommend discipline. *See* Edgar Depo. at 195:24 to 196:7. The EEOC, however, has not presented evidence that Grado gave an opinion or recommendation during his conversations with Edgar.

incident of insubordination, and the final warning BCI issued to Peters in 1999, also factored into Edgar's decision to terminate his employment. *See id.* Edgar understood that Peters had already been given more chances than the policy required on this issue, and that any action short of termination could set a bad precedent for BCI's stance on insubordination. *See id.* Peters' failure to come to work on Sunday also contributed, to a lesser extent, to Edgar's decision to terminate Peters' employment, insofar it represented the continuation of the act of insubordination which Peters commenced on Friday, September 28, 2001. *See id.* ¶ 14, at 6.

Peters worked all day Monday from 5:00 a.m. to 5:00 p.m. and then saw Grado at a health insurance meeting on Monday evening. On Monday evening, Grado told Peters to be at the plant at 8:00 a.m. the next day, to which Peters responded "okay." Peters Depo. at 134:2 to 136:20.

At the meeting on Tuesday October 2, 2001, Grado asked Peters if he knew why he was there (in Pedersen's office), and Peters responded that he did not know. *See id.* at 138:7-10. Pedersen and Bateluna, Grado's supervisor, were also in present at the meeting. *See id.* at 137:18-24. Grado told Peters that he had been terminated for insubordination. *See id.* at 138:11-14. Peters informed Grado that he had "reported off work" to his immediate supervisor, Jeff Katt, because he had been sick, and that Katt had approved his absence. *Id.* at 138:24 to 139:4. Peters was discharged immediately and did not receive an exit interview. Peters contends that his immediate dismissal without an exit interview and investigation was against company policy. Edgar testified that Peters should have received an exit interview and that she does not know why he did not receive one. *See* Edgar Depo. at 185:18-22.

Edgar stated that she did not learn that Peters was African American until Pedersen called her after the termination meeting on Tuesday, October 2, 2001. *See* Edgar Decl. ¶ 17 at 7-8. Pedersen stated that she did not know that Peters was African American until he walked into her office for the termination meeting on Tuesday, October 2, 2001. *See* Pedersen Decl. ¶ 10 at 3. The EEOC contends that both Edgar and Pedersen did have knowledge that Peters is African American based on their access, to information disclosing Peters' race. *See* Plaintiff Equal Employment Opportunity Commission's Response in Opposition to Defendant's Motion for Summary Judgment at 14, filed March 17, 2004 (Doc. 73). Peters' personnel file contained documents that revealed that he was African American. Included in his file were two "Confidential Employee Supplemental Data Sheets" where Peters had marked his race as "black." The EEOC also contends that Edgar had direct access to information concerning employee ethnicity.

Peters contends that BCI treated him differently than other employees in similar situations. *See* Peters Aff. ¶ 16 at 3. According to Peters, other employees missed more days in one year than Peters missed in six and a half years. *See* Peters Depo. at 162:21 to 163:9. Peters missed two days in six and a half years: one with a doctor's excuse and one time when his fiance's son was killed and he missed work to attend the funeral (the 1999 incident). *See id.*

The EEOC has proffered evidence that Grado treated African Americans less favorably than he treated employees of other racial groups or otherwise harbored racial bias toward African Americans. Three BCI employees submitted affidavits containing statements that Grado treated African American employees worse than he treated non-African Americans and made racial remarks at work. *See* Affidavit

of James Young ¶ 6, at 2 (executed March 12, 2004); Wilson Aff. ¶¶ 5, 7, at 1-2; Affidavit of Bryan Esquibel ¶¶ 5-7, at 1-2 (executed March 12, 2004). Katt also testified that Grado may have called Peters a "nigger." Katt Depo. 62:19 to 65:2. Katt also went to great lengths, however, to clarify that he was not sure that Grado actually made that statement. *See id.*

The EEOC directed the Court's attention to four BCI employees that it contends were treated more favorably than Peters. Damian Mirabal is a non-African American merchandiser who worked under Grado's supervision from December 2000 to November 2001. Mirabal received a verbal warning for having missed work five times in a six month period. Arturo Lopez, a Hispanic merchandiser, refused to return a page from his supervisor and was threatened with insubordination and termination. BCI did not terminate Lopez because he did not return to work and therefore "abandoned his job." Supplemental Declaration of Sherry Pedersen ¶ 2, at 1-2 (executed March 30, 2004). Oran Sage was a non-African American employee who was not under Grado's direct supervision.[5] BCI disciplined Sage for leaving the premises without his supervisor's approval. *See* Deposition of Oran Sage at 36:3-18. Monica Lovato, a Hispanic merchandiser under Grado's supervision, failed to report for work on a scheduled day off. Lovato voluntarily terminated her employment in 2002. *See* Pedersen Decl. ¶ 14 at 5.

BCI contends that Peters never made any formal complaints to anyone at BCI at any time during his employment that he was subjected to discrimination based on

---

[5] At times, the parties also refer to Mr. Sage as "Kelly" Sage.

his race. *See* Peters Depo. at 87:5-16. In his affidavit, Peters states that he complained to James Young, a BCI employee, on several occasions that he felt he was being treated differently because he was African American. *See* Peters Aff. ¶ 16, at 3. Peters brought no formal complaints of race discrimination to the attention of the Human Resources Department during his employment at BCI. *See* Pedersen Decl. ¶ 8 at 3.

SUMMARY JUDGMENT STANDARD IN EMPLOYMENT CONTEXT

Under rule 56, any party may move for summary judgment. *See* Fed. R. Civ. P. 56(a) and (b). The moving party initially carries the burden of pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case, although the moving party "need not affirmatively negate the nonmovant's claim in order to obtain summary judgment." *Allen v. Muskogee*, Oklahoma, 119 F.3d 837, 840 (10th Cir. 1997) (citing *Celotex v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), *cert. denied*, 522 U.S. 1148, 118 S. Ct. 1165, 140 L. Ed. 2d 176 (1998)). Once the movant has met this burden, the nonmoving party must go beyond the pleadings and show that a genuine issue of material fact exists that would require a trial. The nonmoving party may not avoid summary judgment by resting upon only the allegations or denials in the pleadings. *See Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). The Court must grant the motion "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

In ruling on a summary judgment motion, the Court examines the factual record and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *See Allen v. Muskogee*, Oklahoma, 119 F.3d at 839-40. The Court's role in deciding a motion for summary judgment is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *See Aeolus v. Shvartsman*, 61 F.3d 805, 808 (10th Cir. 1995).

"The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 247-48 (emphasis in original). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248 (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, at 93-95 (1983)). If the evidence is merely colorable, or is not significantly probative, summary judgment is appropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249-50.

A claim of intentional disparate treatment based on race can survive summary judgment only when the plaintiff has presented sufficient evidence to show that there is a genuine issue of material fact whether the plaintiff's race actually motivated the allegedly discriminatory conduct. *See Reeves*

v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) ("Liability depends on whether the protected trait... actually motivated the employer's decision."). "A plaintiff alleging discrimination on the basis of race may prove intentional discrimination through either direct evidence of discrimination (*e.g.*, oral or written statements on the part of a defendant showing a discriminatory motivation) or indirect (*i.e.*, circumstantial) evidence of discrimination." *Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d 1220, 1225 (10th Cir. 2000) (citing *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999); *Elmore v. Capstan, Inc.*, 58 F.3d 525, 529 (10th Cir. 1995)). In cases involving circumstantial evidence of discrimination, courts should apply the analysis that the Supreme Court of the United States set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *See Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d at 1225.

Under the McDonnell Douglas framework, the plaintiff, here the EEOC, "must carry the initial burden under the statute of establishing a prima facie case of racial discrimination." *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802. "Once the plaintiff has established a prima facie case, 'the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason' for its employment action." *Kendrick v. Penske Transp. Services*, Inc., 220 F.3d at 1226 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802). "If the defendant makes this showing, the plaintiff must then show that the defendant's justification is pretextual." *McDonnell Douglas Corp. v. Green*, 411 U.S. at 804.

LEGAL ANALYSIS

The sole claim remaining in this case is the EEOC's allegation that BCI terminated Peters' employment because of his race. It is an "unlawful employment practice for an employer... to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Both parties agree that this case does not involve direct evidence of discrimination and that the McDonnell Douglas analysis applies.[6]

BCI does not dispute that the EEOC has met its burden to establish a prima facie case of discriminatory discharge. And while the EEOC disputes whether BCI has come forward with a legitimate nondiscriminatory reason for its conduct, the Court believes that BCI's burden is one of production and not of persuasion. Thus, BCI need only articulate a legitimate nondiscriminatory reason for discharging Peters. The EEOC's arguments with respect to the legitimacy of BCI's proffered reason are more appropriately directed toward to the question of pretext. Because the Court finds that the EEOC has not created a genuine issue of material fact with respect to the question whether BCI's stated reason for its decision is mere pretext for discrimination, the Court will grant BCI's motion for summary judgment.

---

[6] "In the absence of direct evidence of discrimination, a Title VII claimant may prove his case by inference." Response at 5. Both parties relied upon the McDonnell Douglas analysis in their briefs.

I. THE EEOC HAS ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATORY DISCHARGE.

In the United States Court of Appeals for the Tenth Circuit, a plaintiff must demonstrate four elements to establish a prima facie case of discriminatory discharge: (i) he belongs to a protected class; (ii) he was qualified for his job; (iii) despite his qualifications, he was discharged; and (iv) the job was not eliminated after his discharge. *See Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d at 1229 (citing *Perry v. Woodward*, 199 F.3d 1126, 1138 (10th Cir. 1999)). In this case, BCI does not dispute that the EEOC satisfies these four elements. *See* Memorandum in Support of Defendant's Motion for Summary Judgment at 16, filed February 19, 2004 (Doc. 66) ("BCI does not dispute that Plaintiff can establish a prima facie case of discriminatory discharge."). BCI's acknowledgment of a prima facie case means that, for purposes of this motion, the Court will accept the following elements of proof as true: (i) Peters was, at all relevant times, in a protected racial class; (ii) Peters was, at all relevant times, qualified for his position with BCI; (iii) despite Peters' qualifications, BCI discharged him; and (iv) BCI did not eliminate Peters' position after discharging him. *See Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d at 1229.

The Tenth Circuit has stated that, when a plaintiff establishes a prima facie case under the McDonnell Douglas analysis, he or she creates "a rebuttable presumption that [the] employer unlawfully discriminated against [the plaintiff]." *Perry v. Woodward*, 199 F.3d at 1138, n.9 (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)).

> When viewed against a backdrop of historical workplace discrimination, an employee who belongs

> to a racial minority and who eliminates the two most common, legitimate reasons for termination, *i.e.*, lack of qualification or the elimination of the job, has at least raised an inference that the termination was based on a consideration of impermissible factors. The firing of a qualified minority employee raises the inference of discrimination because it is facially illogical for an employer to randomly fire an otherwise qualified employee and thereby incur the considerable expense and loss of productivity associated with hiring and training a replacement.

Perry v. Woodward, 199 F.3d at 1140. Thus, in this case, the EEOC has created a rebuttable presumption that BCI discriminated against Peters by terminating his employment because of his race.

II. BCI HAS ARTICULATED A LEGITIMATE, NONDISCRIMINATORY REASON FOR TERMINATING PETERS' EMPLOYMENT.

Once a plaintiff establishes a prima facie case of racial discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment action. *See Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d at 1226. "This burden is one of production, not persuasion; it 'can involve no credibility assessment.'" *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 142 (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)). BCI can meet this burden by offering admissible evidence sufficient for the trier of fact to conclude that it based its decision to terminate Peters' employment on a legitimate factor other than race. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 142 ("Respondent met this burden

by offering admissible evidence sufficient for the trier of fact to conclude that petitioner was fired because of his failure to maintain accurate attendance records.").

BCI asserts that it terminated Peters' employment because of his insubordinate conduct toward Grado. *See* Memorandum in Support of Defendant's Motion for Summary Judgment at 16 ("BCI terminated Mr. Peters for insubordination."). "Insubordination could serve as a legitimate non-discriminatory reason for discharge to rebut the plaintiff's prima facie case." *Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1411 (10th Cir. 1984) (citing *Ray v. Safeway Stores, Inc.*, 614 F.2d 729, 731 (10th Cir. 1980)). Thus, BCI has satisfied its burden to articulate a legitimate, nondiscriminatory reason for the employment action that it took with respect to Peters.

The EEOC contends that BCI's proffered reason for Peters' termination fails for several reasons: (I) Peters was not actually insubordinate; (ii) BCI's claim that the decision-maker did not know Peters' race is without merit; and (iii) substantial evidence exists that Grado, rather than Edgar, was the decision-maker behind Peters' termination. *See* Response at 8-18. These arguments, even if accurate, do not affect BCI's ability to meet its burden to set forth a legitimate, nondiscriminatory reason for its decision.

> The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's [termination]. The explanation provided must be

> legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 254-55 (internal citations and footnotes omitted). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253 (citations omitted). Accordingly, the Court believes that it is more appropriate to address the EEOC's arguments in a pretext analysis.

III. THE EEOC HAS NOT CREATED A GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO THE ISSUE OF PRETEXT.

Once the employer articulates a legitimate, nondiscriminatory explanation for its decision, the presumption of discrimination disappears. *See id.* at 255 ("If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted[.]"). "The plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* at 253. "A plaintiff establishes pretext by revealing 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence.'" *Equal Employment Opportunity Commission v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1198 (10th Cir. 2000) (quoting *Bullington v.*

United Air Lines, Inc., 186 F.3d 1301, 1317 (10th Cir.1999)). The EEOC has raised several arguments in an effort to create a genuine issue of material fact concerning pretext.

Three of the EEOC's arguments were mentioned above: (i) Peters was not actually insubordinate; (ii) BCI's assertion that Edgar did not know Peters' race before making her decision is without merit; and (iii) substantial evidence exists that Grado, rather than Edgar, was the decision-maker behind Peters' termination. *See* Response at 8-18. In its briefing directly addressing the pretext issue, the EEOC also argued that: (i) BCI acted contrary to a written policy when it terminated Peters; (ii) BCI acted contrary to an unwritten company policy or practice by treating similarly situated individuals of a different class differently from Peters; (iii) evidence of Grado's racial bias supports a finding of pretext; and (iv) statistical evidence concerning the racial composition of BCI's work force supports a finding of pretext. *See id.* at 18. For the reasons stated on the record in open court during the hearing on this matter, and for the reasons set forth below, the Court finds that the EEOC has not demonstrated that there is a genuine issue of material fact that would require a trial.

A. NO GENUINE ISSUE OF MATERIAL FACT EXISTS WHETHER BCI'S STATED REASON FOR TERMINATING PETERS' EMPLOYMENT IS FALSE.

The EEOC argues that BCI's proffered reason for terminating Peters' employment is a pretext for discrimination because Peters was, in fact, not insubordinate. The EEOC maintains that, to establish that Peters was insubordinate, BCI "must articulate an occasion when Stephen Peters resisted

authority, refused to obey, used objectionable language or was abusive toward a supervisor." Response at 8 (citing Webster's Third New Dictionary at 999 (1981); 48 Am. Jur. 2d Labor and Labor Relations § 2259). The EEOC contends that BCI is unable to articulate any of these conditions.

"District courts, when analyzing the pretext issue, do not sit as 'super-personnel departments' free to second-guess the business judgment of an employer." *Bullington v. United Airlines, Inc.*, 186 F.3d at 1318 n. 14, overruled in part on other grounds by *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002). The relevant inquiry is not whether BCI's proffered reasons were "wise, fair or correct," but whether BCI "honestly believed those reasons and acted in good faith upon those beliefs." *Bullington v. United Airlines, Inc.*, 186 F.3d at 1318 (citing *Sanchez v. Philip Morris Inc.*, 992 F.2d 244, 247 (10th Cir.1993) ("Title VII is not violated by the exercise of erroneous or even illogical business judgment."); *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677 (7th Cir. 1997) ("Arguing about the accuracy of the employer's assessment [of plaintiff's performance] is a distraction, because the question is not whether the employer's reasons for a decision are right but whether the employer's description of its reasons is honest." (internal quotation marks and citations omitted.))). Further, "a challenge of pretext requires [the Court] to look at the facts as they appear to the person making the decision to terminate plaintiff." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d at 1231.

Thus, in this case, Peters' subjective belief whether he committed insubordination is not relevant. The Court must analyze the pretext issue by determining whether a genuine issue of material fact exists whether BCI honestly believed that Peters had committed insubordination and whether that

was the true reason for its decision to terminate his employment. The EEOC has been unable to dispute, by competent evidence, that Patricia Edgar, the Employee Relations Manager responsible for deciding all termination issues, believed that Peters' conduct on Friday, standing alone, warranted termination. *See* Edgar Decl. ¶ 10, at 4 ("I made the determination on Friday, September 28, 2001, that Mr. Peters was insubordinate."). The EEOC has also been unable to point to evidence in the record which contradicts that Edgar made the decision to terminate because she believed that Peters' conduct met BCI's definition of insubordination. *See id.* ¶ 9, at 4 ("Insubordination occurs when the employee knows that he is considered to be defying a direct order of the supervisor and that his conduct could lead to termination."). It is BCI's definition of "insubordination" that controls. Although the EEOC argues for a different definition, Tenth Circuit law states that the Court must evaluate a pretext challenge by reference to "the facts as they appear to the person making the decision to terminate plaintiff." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d at 1231.

And while the EEOC challenges BCI's ultimate conclusion that Peters was insubordinate, it does not challenge the facts underlying that conclusion. In fact, Peters admitted those facts at his deposition. Grado called Peters on Friday to discuss Peters coming in to work on Sunday and told Peters: "I'm not asking you to come to work, I'm telling you to come to work. If you do not come to work, it could lead to insubordination and could lead to termination." Peters Depo. at 121:11-14. Rather than agree to come in to work on Sunday, Peters told Grado to "do what [you've] got to do, and I'll do what I've got to do." *Id.* at 121:23 to 122:1. According to BCI, Peters' statement during that telephone conversation was an act of insubordination.

The EEOC argues that the Court should find a genuine issue of material fact with respect to pretext because it is unclear when Peters' insubordination, if any, occurred. According to the EEOC, Peters could not have committed insubordination on Friday, September 28, 2001 because Grado did not order him to take any action on Friday. The order from Grado required Peters to report to work on Sunday. The EEOC also argues that Peters did not commit insubordination on Sunday, September 30, 2001 because he stayed home from work with Katt's permission. The EEOC has not introduced evidence into the record, however, to contradict Edgar's stated reasons for the decision to terminate Peters' employment.

> By the end of the day Monday, October 1, 2001, I had made a final decision to terminate the employment of Stephen Peters. This decision was based on several factors. First and foremost was the conduct of Mr. Peters towards Mr. Grado on Friday, September 28, 2001. There was no question in my mind that Mr. Peters had committed the offense of insubordination that day. A single offense of insubordination is sufficient to warrant termination under BCI policy. However, this was not Mr. Peters' first offense of insubordination. The fact that Mr. Peters had previously been written up for insubordination and had already been given a final warning on this issue also contributed to my decision to terminate his employment. Mr. Peters had already been given more chances than the policy required on this issue, and I felt that any action short of termination at that juncture could set a bad precedent on the issue of BCI's stance with respect to insubordination.

Edgar Decl. ¶ 13, at 6.

Thus, while the EEOC argues that insubordination did not occur on Friday, the EEOC has not provided evidence to contradict BCI's evidence that Peters engaged in the conduct that BCI attributes to him. The EEOC's argument that BCI somehow misinterpreted that conduct is insufficient to create a genuine issue of material fact on the issue of pretext. "[A] challenge of pretext requires [the Court] to look at the facts as they appear to the person making the decision to terminate the plaintiff." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d at 1231. There is no evidence to support the contention that BCI did not honestly believe that Peters was insubordinate on Friday.

The EEOC also argues that insubordination did not occur on Sunday because Peters missed work with Katt's permission. It is undisputed that Peters called in sick to Katt on Saturday evening. According to Edgar, however, that call did not justify Peters' absence or preclude a determination that Peters was insubordinate.

> The fact that Mr. Peters called in sick to Jeff Katt on Saturday night had no impact whatsoever on my assessment of the situation, for several reasons. First, in my opinion, the timing of Mr. Peters' alleged sickness was highly suspect. I knew that he worked his scheduled shifts on Friday, September 28, 2001 and Monday, October 1, 2001, which led me to conclude he could have come to work on Sunday if he wished to do so. I also found it particularly suspicious that Mr. Peters chose to call in sick to Mr. Katt, rather than Mr. Grado, given the fact that Mr. Peters had been warned by Mr. Grado the day before that if he did not come to work he would be subject to termination. In my opinion, which I formulated prior to my decision to terminate, if Mr. Peters had

> genuinely been sick, and unable to work, and was genuinely interested in preserving his employment relationship with BCI, he would have called in to explain the situation directly to Mr. Grado.

Edgar Decl. ¶ 14, at 6-7. Thus, reference to Peters' Saturday evening telephone call to Katt does not create a genuine issue of material fact whether Edgar believed Peters was insubordinate on Sunday.

The EEOC argues that the Disciplinary Status Notice creates a genuine issue of material fact whether BCI terminated Peters for failure to report to work on Sunday rather than for his conduct toward Grado on Friday. The Notice shows a violation date of September 30, 2001 and contains the following narrative:

> Group A: Insubordination: On Friday 9-28-01 you were given a direct order to come into work on Sunday 9-30-01 due to business necessity. I also explained how this was a direct order and failure to comply with the directive would be considered insubordination and would result in termination. You explained how you had plans and that I "should do whatever I had to do." You did not report to work on Sunday 9-30-01, therefore your employment is being terminated for insubordination.

Disciplinary Status Notice (September 30, 2001). Although the Notice mentions Peters' failure to report to work on Sunday, September 30, 2001, the Court does not believe that it creates a genuine issue of material fact on the issue of pretext. It is consistent with Edgar's declaration.

Edgar has stated that Peters' failure to report to work played a role in her decision to terminate Peters' employment. *See* Edgar Decl. ¶ 14, at 6. Edgar viewed Peters' "failure to come to work on Sunday not as an isolated attendance issue, but as the fulfillment of his stated intention the previous Friday to defy Mr. Grado's direct order." *Id.* Edgar viewed Peters' conduct on Friday and Sunday as parts of the same chain of events. Thus, that the Notice lists Peters' conduct on Sunday, September 30, 2001 as the reason for his termination is not inconsistent with BCI's stated position and does not create a genuine issue of material fact.[7]

---

[7] The EEOC's characterization of Peters' termination as one for failure to report to work serves as the basis for its later argument that BCI treated Peters differently than other similarly situated individuals. The EEOC has not been able to dispute, however, that BCI terminated Peters' employment because of insubordination rather than attendance violations. *See* Edgar Decl. P 16, at 7 ("Mr. Peters was terminated solely for insubordination. Mr. Peters was not terminated because he did not show up for work on Sunday, except to the extent this conduct is viewed in context with his exchange with Mr. Grado on Friday, September 28, 2001, as the fulfillment of Mr. Peters stated intention to defy a direct order from Mr. Grado."). The fact that Grado's order to Peters involved coming into work does not automatically transform Peters' violation from insubordination into an attendance violation; the attendance violation was incidental to Peters' insubordination. Thus, Peters is not similarly situated with other employees whom BCI disciplined for violation of various attendance rules.

B. NO GENUINE ISSUE OF MATERIAL FACT EXISTS WHETHER GRADO, RATHER THAN EDGAR, MADE THE DECISION TO TERMINATE PETERS' EMPLOYMENT.

The parties dispute whether Edgar or Grado made the decision to terminate Peters' employment. The EEOC argues that "Edgar relied on 'facts' obtained from Grado. Based on the 'facts' as reported by Grado, Edgar **authorized** Grado to terminate Mr. Peters." Response at 15 (emphasis in original). In support of its argument that Grado was the decision-maker, the EEOC also points out that it was Grado that anticipated a decision needed to be made and contacted Edgar; that Edgar did not conduct an independent investigation of the facts she received from Grado; and that Grado gave employees the impression that he had the authority to make termination decisions.

The EEOC argues that Edgar unduly relied on Grado's version of the facts because she did not perform an independent investigation into Peters' conduct. There was no evidence, however, either before Edgar or before this Court, to raise the inference that Grado relayed misleading information to Edgar. To the contrary, the evidence is that Peters engaged in the conduct that BCI attributes to him.

Moreover, Edgar did take some steps to more closely evaluate the situation. She met with Pedersen by telephone to learn more information about Peters' disciplinary history. It was during that conversation that she learned that one of Peters' former supervisors had written Peters up for insubordination in 1999 based on his refusal to work a scheduled day off. *See* Edgar Decl. ¶ 11, at 5. That Peters had a similar incident with a different supervisor contributed

to Edgar's conclusion that Grado's version of events was accurate. *See id.*

The EEOC produced evidence that Grado made representations in the workplace that he had the authority to terminate employees under his supervision. *See* Katt Depo. at 72:7-13. During his employment with BCI, Katt assumed that Grado was the one who made decisions to terminate employees. *See id.* at 71:21 to 72:5. Other employees also believed that Grado had the ability to fire the individuals he supervised. *See* Wilson Aff. ¶ 8, at 2-3. Peters also testified that he believed Grado had the authority to discipline and fire employees. *See* Peters Aff. ¶ 18, at 3.

Grado's statements, however, and employees' subjective beliefs, do not create a genuine issue of material fact whether Grado had the authority to terminate employees. With respect to Grado's actual authority, the evidence is undisputed. Edgar had to authorize "*all* terminations." Edgar Decl. ¶ 3, at 2 (emphasis in original). *See also* Pedersen Decl. ¶ 2, at 2. Grado did not have independent authority to discipline or terminate employees working under his supervision. *See* Grado Decl. ¶ 6, at 3 ("All such disciplinary actions must be authorized by our Human Resources Department. It is my responsibility to deliver or communicate all disciplinary actions -- whether verbal or written -- to employees working under my supervision."). When an employee had an attendance, performance, or disciplinary issue, Grado brought those facts to the attention of the Human Resources Department, which would in turn decide which company

polices applied to the situation and the appropriate action to take under the circumstances. *See id.*[8]

BCI has produced admissible evidence that Edgar was the final decision making authority on terminations generally. *See* Edgar Decl. ¶ 3, at 2; Pedersen Decl. ¶ 2, at 2. It has also produced competent evidence that Edgar was the decision-maker specifically with respect to Peters' termination. *See* Edgar Decl. ¶ 15, at 7 ("I was solely responsible for making the decision to terminate Mr. Peters' employment. At no point during my meetings with Mr. Grado did I ask -- or did Mr. Grado offer -- an opinion or recommendation as to what should be done with Mr. Peters."). *See also* Grado Decl. ¶ 13, at 5 ("During these conversations, I simply reported the facts to Ms. Edgar and gave no opinion or recommendation as to what I thought should happen to Mr. Peters.").

In response to the evidence that Edgar, rather than Grado, made the final decision to terminate Peters' employment, the EEOC argues that "a defendant may be held liable if the manager who discharged the plaintiff merely acted as a rubber stamp, or the 'cat's paw,' for a subordinate employee's prejudice, even if the manager lacked discriminatory intent."

---

[8] The EEOC also brings Grado's training in discipline to the Court's attention. *See* Response at 16 n.3 ("Moreover, Cesar Grado was required to attend training on "*discipline and dismissal decisions,*" and a supervisor's "*role in discipline.*") (emphasis in original). That Grado participated in such training, however, does not create a genuine issue of material fact whether Grado was the decision-maker behind Peters' termination. It is logical that Grado would attend such training because he is the supervisor who must use professional judgment in determining whether to bring certain conduct to the Human Resources Department's attention.

Kendrick v. Penske Transp. Services, Inc., 220 F.3d at 1231.[9] Edgar, however, did not act as a "rubber stamp" or "cat's paw" for Grado's prejudice. The EEOC does not dispute with any competent evidence that Grado did not express an opinion or recommendation to Edgar about what he thought BCI should do about Peters. *See* Grado Decl. ¶ 13, at 5.

Cases in which other circuits have recognized this "rubber stamp" theory involved situations in which a decision-maker accepted the *recommendations* of a biased supervisor without conducting an independent investigation. *See e.g., Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996) ("If, on the other hand, Aguero did not conduct his own independent investigation, and instead merely 'rubber stamped' the recommendations of Clark and Kelley, the causal link between Long and Reavis's protected activities and their subsequent terminations would remain intact."); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990)("Lehnst not only set up Shager to fail by assigning him an unpromising territory but influenced the committee's deliberations by portraying Shager's performance to the committee in the worst possible light. Lehnst's influence may well have been decisive. The committee's deliberations on the question whether to fire Shager were brief, perhaps perfunctory; no member who was deposed could remember having considered the issue."). In this case, Grado did not make any

---

[9] Although the EEOC cites *Kendrick v. Penske Transp. Services, Inc.* for this proposition, the Court notes that *Kendrick* does not say that the Tenth Circuit accepts that test. It only says that "other circuits have recognized" that test and then explains why it failed to assist the plaintiff in *Kendrick*. Similarly, while this Court does not decide the appropriateness of the test, it does not believe that the test assists the EEOC in establishing a genuine issue of material fact on pretext.

recommendations to Edgar. Furthermore, Edgar attempted to do at least some independent investigation by consulting with Pedersen regarding Peters' disciplinary history.

Even if the Court were to analyze this case under the "rubber stamp" theory, the EEOC has not directed the Court's attention to any evidence in the record linking Grado's potential bias to his decision to involve Edgar in the situation with Peters. The EEOC has not presented evidence that Grado would not have called Edgar if Peters was Anglo or Hispanic. It is undisputed that Grado believed he needed to consult Human Resources and that Pedersen was unavailable.

The only arguably similar incident involved another merchandiser, Monica Lovato, not reporting to work on a day off as requested. *See* Katt Depo. at 118:1 to 119:23. Because that situation was different in two significant ways, the Court does not believe that Grado's failure to contact Human Resources in Lovato's situation supports an inference that he makes such decisions based on the employee's race. First, unlike Peters, Lovato did not refuse to work the day off as requested, but rather agreed to work and then failed to report to work. Second, once Lovato failed to report to work, her violation was an attendance violation rather than insubordination.

Evidence of Grado's racial bias and comments, standing alone, is insufficient to support an inference that he made the decision to contact Edgar because of Peters' race. Although the Court finds that Grado was not the decision-maker in this case, case law discussing racial bias on the part of a decision-maker is informative on this area of proof. "Although [racial] comments may serve as circumstantial evidence of discrimination, the plaintiff must still show some nexus

between the statements and the defendant's decision to terminate the employee. Isolated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions." *Shorter v. ICG Holdings, Inc.*, 188 F.3d at 1209-10 (citations and internal quotation marks omitted). Thus, if the EEOC were attempting to show that Grado improperly influenced or initiated Peters' termination, it would need to demonstrate some causal connection between his racial bias and his decision to involve Edgar. The EEOC has not presented such evidence.

Finally, the EEOC argues that there is a genuine issue of material fact whether Grado was the decision-maker because the Disciplinary Status Notice BCI issued to Peters at the time of his termination does not identify Edgar as the decision-maker, and BCI did not identify Edgar as the decision-maker during administrative proceedings. The Court does not believe that these omissions create a genuine issue of material fact whether Grado was the decision-maker because they are not inconsistent with the evidence BCI has produced in favor of summary judgment. Grado stated that it is his responsibility to "deliver or communicate all disciplinary actions... to employees working under [his] supervision." Grado Decl. ¶ 6, at 3.

C. NO GENUINE ISSUE OF MATERIAL FACT EXISTS WHETHER PETERS' RACE PLAYED A ROLE IN THE DECISION TO TERMINATE HIS EMPLOYMENT.

Grado knew that Peters was African American. Because the Court has found, however, that the record shows that Grado did not make the decision to terminate Peters' employment, it is necessary to examine whether the actual decision-maker knew of Peters' race and possessed any

racially discriminatory motivation. The EEOC raises two arguments in an effort to create a genuine issue of material fact on this issue. First, the EEOC argues that Edgar had knowledge of Peters' race because she had access to documents containing that information. Second, the EEOC argues that other BCI management officials who acted in concert with Edgar had knowledge that Peters is African American.

Neither of the EEOC's arguments assumes that Edgar had actual knowledge of Peters' race. The EEOC's first argument attempts to impute knowledge to Edgar because she had the ability to discover the information if she chose to do so. The EEOC contends that documents disclosing Peters' race were available to Edgar through Peters' personnel file, which Pedersen reviewed in Albuquerque and discussed with Edgar. These documents, however, were located in Albuquerque, not Phoenix. The EEOC also asserts that Edgar also could have learned of Peters' race by accessing information that BCI maintains as part of its Human Resources management.

The EEOC's argument does not create a genuine issue of material fact because, although it establishes that Edgar had the opportunity to learn Peters' race, there is no evidence that she availed herself of that opportunity. It is undisputed that Edgar worked in Phoenix, rather in than Albuquerque, and that she did not meet Peters before she made the decision to terminate him. *See* Edgar Decl. ¶ 18, at 8. Her communications with Grado and Pedersen were all by telephone. Further, there is no evidence to contradict Edgar's sworn testimony that she did not know that Peters was African American until after the termination. *See id.* ¶ 17-18, at 7-8 ("Race played no part whatsoever in my decision to terminate the employment of Stephen Peters. I did not even know he was African American when I made the decision to

terminate his employment."). She was not present when Grado told Peters that BCI had terminated him.

The EEOC's second argument also does not create a genuine issue of material fact that BCI's stated reason for terminating Peters' employment was pretextual. The EEOC points out that other BCI management officials in Albuquerque, who were directly involved in Peters' termination, were aware that he is African American, Grado, Pedersen, and Bateluna were each present during the meeting when Grado informed Peters of the termination. The EEOC contends that each of those three people knew that Peters was African American. The Court cannot attribute this knowledge to Edgar, however, because there is no evidence that any of those three people conveyed their knowledge of Peters' race to Edgar. Edgar's sworn testimony is that she did not know Peters' race.

Pedersen testified that she did not realize that Peters was African American until he entered the meeting where Grado announced the termination. *See* Pedersen Decl. ¶¶ 9-10, at 3. There is no evidence to contradict that assertion. If Pedersen learned of Peters' race at the time of the termination, there was no basis for her to attempt to change Edgar's decision merely because of Peters' race. Edgar made the decision based on other factors and any new information concerning race was irrelevant.

The EEOC also argues that Grado's knowledge of Peters' race creates a genuine issue of material fact on pretext. Grado was the supervisor who decided to seek guidance from Edgar on Friday, September 28, 2001. The EEOC contends that this decision was the "first and most critical decision made concerning Peters' termination." Response at 15. The Court assumes that the EEOC believes Grado's decision to

involve Edgar was critical because the EEOC also argues that Grado was biased against African Americans. According to the EEOC, it was this alleged racial bias that motivated Grado to initiate the process of Peters' termination.

The Court believes that the EEOC has created a genuine issue of fact whether Grado was biased against African Americans. It has introduced the affidavits of several employees, including Peters, who believe that Grado treated African Americans less favorably than he treated employees of other races. The Court does not believe, however, that this issue is material. The record shows that Edgar, not Grado, made the determination that Peters was insubordinate and was the decision-maker behind Peters' termination. There is no evidence that Grado communicated his racial bias to Edgar. Edgar did not know that Peters was African American and did not receive any recommendation from Grado as to how to discipline Peters. Furthermore, there is no evidence that the information Grado communicated to Edgar, and on which Edgar relied to make her decision, was false.

Accordingly, the Court does not believe that Grado's, Pedersen's, and Bateluna's knowledge of Peters' race creates a genuine issue of material fact whether BCI's stated reason for terminating Peters' employment was a pretext for discrimination. Also, the EEOC has not created a genuine issue of material fact whether Edgar knew Peters' race. Aside from the arguments of counsel, there is nothing before the Court to support the inference that Edgar knew Peters is African American.[10] If the Court were to allow this case to

---

[10] The EEOC also argues that statistical evidence concerning the racial composition of BCI's work force supports a finding of pretext. In April 2002, only three of the 200 employees in BCI's

proceed to a jury, and the evidence was what it is in the record, the Court would still be confronted with a situation in which the decision-maker did not know the race of the employee.

D. NO GENUINE ISSUE OF MATERIAL FACT EXISTS WHETHER BCI ACTED CONTRARY TO AN UNWRITTEN COMPANY POLICY BY TREATING SIMILARLY SITUATED INDIVIDUALS DIFFERENTLY THAN IT TREATED PETERS.[11]

The EEOC also argues that the Court should find a genuine issue of material fact on the issue of pretext because BCI treated Peters differently than other similarly situated individuals of different racial classes. "An employee is similarly situated to the plaintiff if the employee deals with the same supervisor and is subject to the 'same standards governing performance evaluation and discipline.'" *Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d at 1232 (quoting

---

Albuquerque facility were African American. *See* Current Albuquerque Employee Roll (dated April 24, 2002). The Court does not believe that this fact, under the circumstances present in this case, is sufficient to create a genuine issue of material fact on the issue of pretext, and the EEOC does not explain how it does.

[11] The EEOC also alleges that BCI acted contrary to its written policies when it terminated Peters' employment. For example, BCI did not provide Peters with an exit interview after his termination. This fact, however, does not create a genuine issue of material fact whether BCI's stated reason for the termination was pretextual. Edgar made the decision to terminate Peters' employment without knowledge of his race. The lack of an exit interview does not change that undisputed fact.

Aramburu v. Boeing Co., 112 F.3d 1398, 1404 (10th Cir. 1997)). "The burden is on the plaintiff to demonstrate he is similarly situated to the employees to whom he is comparing himself." *Kelley v. Goodyear Tire and Rubber Co.*, 220 F.3d 1174, 1178 (10th Cir. 2000) (citing *Cone v. Longmont United Hosp. Ass'n.*, 14 F.3d 526, 532 (10th Cir. 1994)).

The EEOC identifies four individuals that it alleges committed rule violations of comparable seriousness to Peters: (i) Arturo Lopez; (ii) Monica Lovato; (iii) Damian Mirabal; and (iv) Oran Sage. With respect to each individual, however, there is some differentiating or mitigating circumstance that distinguishes him or her from Peters. For example, Sage was not a merchandiser and did not report to Grado. Sage failed to follow his supervisor's order to reload his truck and take out a delivery, then left the premises without his supervisor's permission. *See* Pedersen Decl. ¶ 15, at 5. Pedersen determined that, although Sage had violated company policy, he had not committed insubordination because there was no evidence to suggest that his supervisor had told him that his conduct was insubordination and could lead to termination. *See id.* Accordingly, Pedersen gave Sage a written warning for a Group B violation and suspended him without pay for three days. *See id.*

Damian Mirabal had attendance and work performance issues. Mirabal received progressive discipline addressing these Group C violations, and BCI ultimately terminated him for unsatisfactory performance. *See id.* ¶ 13, at 4. Mirabal did not refuse to obey a direct order, and Grado did not tell Mirabal that his conduct was insubordinate. *See* Grado Decl. ¶ 17, at 7. Other than Peters, Grado states that he has "never had a situation where an employee refused a direct order, and, after being told his conduct was insubordinate and that

he could be fired, told [him] to 'do what [he has] to do.'" *Id.* ¶ 18, at 7.

Like Mirabal, Lopez also had performance and attendance issues, and also received progressive discipline. *See id.* ¶ 17, at 6-7. There was one incident involving Lopez that the EEOC argues is comparable to Peters' situation. On Lopez' last day of employment with BCI, he refused to return pages both from Katt and from Grado. Grado then sent Lopez a text message telling him that if he refused to return the page he may be terminated. *See id.* ¶ 19, at 7. Lopez did not return the page, but also did not return to work at BCI. *See id.* Thus, because Lopez was no longer with the company, Grado did not bring his insubordination to Pedersen's or Edgar's attention. *See id.* And, if Lopez had returned to work, Grado would have reported his behavior just as he did in Peters' case. *See id.*

Lovato's conduct also involves attendance violations rather than insubordination. She did not have any disciplinary problems during her employment. *See* Pedersen Decl. ¶ 14, at 5. She did not refuse a direct order from Grado, and Grado did not tell her that her conduct was insubordinate and could lead to termination. *See* Grado Decl. ¶ 20, at 8. Any rule violations that Lovato may have committed were attendance violations that were not subject to immediate termination.

These individuals are not similarly situated to Peters because they all committed attendance violations. Peters, on the other hand, did not.

Mr. Peters was terminated solely for insubordination.
Mr. Peters was not terminated for performance issues.
Mr. Peters was not terminated for attendance

> violations. Mr. Peters was not terminated because he called in sick to Mr. Katt instead of Mr. Grado. Mr. Peters was not terminated because he did not show up for work on Sunday, except to the extent this conduct is viewed in context with his exchange with Mr. Grado on Friday, September 28, 2001, as the fulfillment of Mr. Peters' stated intention to defy a direct order from Mr. Grado.

Edgar Decl. ¶ 16, at 7. Because the conduct of the other employees did not rise to the level of insubordination, the EEOC cannot compare their conduct with that of Peters. Accordingly, the Court finds that the EEOC has not established that a genuine issue of material fact exists with respect to pretext, and the Court will grant BCI's motion for summary judgment.[12]

CONCLUSION

Although there is evidence in the record that Grado may have harbored racial bias against African Americans, there is no evidence to suggest that such bias influenced Edgar's decision to terminate Peters' employment. The EEOC has not presented evidence to suggest that Grado would not have contacted Edgar regarding the situation if Peters had been Anglo or Hispanic. Grado relayed accurate information to Edgar about Peters' conduct, and Edgar then independently made the decision to terminate Peters without any recommendation from Grado. And while Grado may have

---

[12] Because the Court finds that there is no genuine issue of material fact whether BCI intentionally discriminated against Peters on the basis of his race, it is unnecessary to address the EEOC's request for injunctive relief.

had the authority to recommend discipline, the undisputed evidence in the record is that he did not make any recommendations to Edgar. In addition to the information she received from Grado, Edgar's decision included consideration of Peters' 1999 incident of insubordination with a different supervisor. Edgar did not know that Peters was African American at the time she made the decision to terminate him. Accordingly, there is no evidence that racial animus motivated BCI's termination of Peters.

IT IS ORDERED that the Defendant's Motion for Summary Judgment is granted and all claims against BCI are dismissed with prejudice.

Dated: 6/10/2004

/s/_____
James O. Browning
UNITED STATES DISTRICT JUDGE

No. 06-341

In the Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

RONALD S. COOPER
General Counsel

VINCENT J. BLACKWOOD
Acting Associate General Counsel

LORRAINE C. DAVIS
Assistant General Counsel

SUSAN R. OXFORD
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether, and in what circumstances, an employer can be liable for racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, based on the alleged bias of a subordinate employee, where the subordinate employee did not take the adverse employment action himself but did influence the decision.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 9
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Abramson v. *William Paterson Coll.*, 260 F.3d 265 (3d Cir. 2001) 10
American Constr. Co. v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372 (1893) 13
Bergene v. *Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136 (9th Cir. 2001) 10
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 13
Griffin v. *Washington Convention Ctr.*, 142 F.3d 1308 (D.C. Cir. 1998) 10
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 13
Hill v. *Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004), cert. dismissed, 543 U.S. 1132 (2005) 8, 12
Lust v. *Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004) 12
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 6

Cases—Continued: Page

Noble v. *Brinker Int'l, Inc.*, 391 F.3d 715 (6th Cir. 2004), cert. denied, 126 S. Ct. 353 (2005) 11

Russell v. *McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000) 7, 11

Santiago-Ramos v. *Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000) 10

Shager v. *Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990) ... 11

Stacks v. *Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316 (8th Cir. 1994) 10

Stimpson v. *City of Tuscaloosa*, 186 F.3d 1328 (11th Cir. 1999), cert. denied, 529 U.S. 1053 (2000) 10

Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 13

Wilson v. *Stroh Cos.*, 952 F.2d 942 (6th Cir. 1992) . 10, 11

Statutes and rule:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 12

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 1, 6, 7, 9, 10, 12

42 U.S.C. 2000e-2(a)(1) 9

Sup. Ct. R. 46.1 12

In the Supreme Court of the United States

No. 06-341

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 450 F.3d 476. The memorandum opinion and order of the district court (Pet. App. 32a-76a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2006. The petition for a writ of certiorari was filed on September 5, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a claim that petitioner racially discriminated against one of its employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e

et seq. The district court granted summary judgment to petitioner. Pet. App. 32a-76a. The court of appeals reversed and remanded. *Id.* at 1a-31a.

1. Stephen Peters, who is black, worked as a merchandiser for petitioner, a bottling company, at its facility in Albuquerque, New Mexico. Peters was responsible for the placement of petitioner's products at retail outlets such as grocery stores. Peters was supervised on a day-to-day basis by Jeff Katt, a white account manager, but reported directly to Cesar Grado, a Hispanic district sales manager. Although Grado was responsible for evaluating Peters and other employees, he had no authority to terminate or discipline employees under his supervision; those decisions were instead taken by petitioner's human resources department. Sherry Pedersen was the highest-ranking human resources officer at petitioner's Albuquerque facility; her supervisor, Pat Edgar, was based at petitioner's facility in Phoenix. Pet. App. 2a-3a, 33a-36a.

On Friday, September 28, 2001, Grado contacted Katt and ordered him to direct Peters to work on the following Sunday. When Katt passed along the order, Peters informed him that he could not work on Sunday because he had other plans. Katt then informed Grado that Peters could not work on Sunday. Grado later said that Katt also told Grado that Peters had said that he "might call in sick"; Peters and Katt, however, both denied that Peters said anything about being sick during that conversation. That afternoon, Grado contacted Edgar to ask whether he could order Peters to come to work on Sunday. Edgar advised Grado to "find out what the situation was," and, unless Peters had a "compelling reason" not to come to work, to order him to work on Sunday. Edgar told Grado to inform Peters that failure

to comply with that order would constitute insubordination that could lead to termination. Pet. App. 3a-4a, 37a-40a.

Grado then contacted Peters. When Grado asked Peters to work on the following Sunday, Peters again said that he had other plans. According to Peters, he also told Grado that he had not been feeling well all week. Grado claimed that he asked Peters what his plans were and that Peters angrily responded that his plans were "none of [Grado's] business"; Peters, however, denied that Grado asked about his plans. It is undisputed that Grado then ordered Peters to work on Sunday and informed him that failure to comply with that order would constitute insubordination that could lead to termination; it is also undisputed that Peters told Grado, "[D]o what [you] got to do and I'll do what I got to do." Grado again contacted Edgar and relayed his version of the conversation with Peters; Edgar determined that Peters' conduct in that conversation, standing alone, amounted to insubordination, but made no decision that afternoon to take action against Peters. Pet. App. 5a, 40a-41a.

On the evening of Saturday, September 29, Peters canceled his plans for the following day and went to an urgent-care clinic. A doctor diagnosed him with a sinus infection, gave him a prescription, and directed him not to return to work until the following Monday. Peters then phoned Katt and informed him that he probably could not work on Sunday because of illness. Katt told Peters that "he didn't have any problem with that." Pet. App. 6a. Katt attempted to reach Grado to inform him that Peters had called in sick, but was unable to do so. *Id.* at 5a-6a, 39a, 43a.

On Monday, October 1, Peters returned to work. During the day, Grado conferred repeatedly with Pedersen and Edgar concerning Peters' conduct. Pedersen pulled Peters' personnel file and determined that Peters had previously received a suspension and a "final warning" for insubordination from a different supervisor after refusing to work on his day off. The file did not indicate that Peters' reason for refusing to work was that the funeral for his fiancee's son (whom he had raised as his own) was scheduled for the day in question, and that the supervisor had told Peters that the funeral was no excuse because the deceased "was not your biological son." Pet. App. 6a-7a, 42a-44a.

Late in the day on Monday, Edgar decided to terminate Peters for insubordination. Edgar later stated that she based her decision primarily on Peters' conduct toward Grado on the preceding Friday. Although Edgar claimed that she had already learned that Katt had excused Peters from coming to work on Sunday (and that that information did not affect her decision), Katt stated that he did not inform Grado that Peters had phoned in sick until a conversation on Monday evening. According to Katt, Grado told him, "I think I'm going to terminate [Peters]," but, when Katt informed Grado that Peters had phoned in sick, Grado "kind of paused" and said, "Why didn't you tell me that earlier?" Pet. App. 7a-8a, 44a-45a.

On Tuesday, October 2, Peters was called to a meeting with Grado and Pedersen. Grado informed Peters that he was being terminated for his failure to report to work on the preceding Sunday. Peters was then presented with a written termination notice, which confirmed that he was being terminated for his failure to report to work. Peters protested, stating that no one at

the meeting had asked why he had not reported to work; that he had not reported to work because he was sick; and that Katt had given him permission not to report. Peters later said that, after he explained his absence, "they all got quiet," and that, "when I left[,] they shut the door and was in there talking." Pet. App. 9a. Shortly after the meeting, Pedersen called Edgar and asked whether she knew Peters was black; while Peters' race was noted in several documents in his personnel file, Pedersen appears not to have learned of his race when she reviewed the file. Edgar later stated that race "played no part whatsoever" in her decision to terminate Peters. *Id.* at 8a-9a, 45a-46a.

There was substantial evidence that Grado had treated Hispanic employees more leniently than he treated Peters. On one occasion, Grado ordered Katt to direct Monica Lovato, a Hispanic merchandiser, to work on a weekend. Lovato informed Katt that it was her birthday that weekend and subsequently failed to show up to work as directed. When Grado was informed that Lovato had disobeyed the order to report to work, he remarked, "You can't make somebody work one of their days off." Pet. App. 11a. Lovato was not disciplined as a result of the incident. Three other merchandisers, two black and one Hispanic, stated that Grado treated black employees worse than other employees. There was also substantial evidence that Grado made racially demeaning comments and jokes about blacks. Katt stated that Grado may have used the word "nigger," or a comparable racial epithet, to describe Peters after his termination. *Id.* at 10a-11a, 23a-26a, 46a-47a.

2. After Peters filed a timely charge of racial discrimination, respondent brought this enforcement action against petitioner in the United States District Court for

the District of New Mexico, contending that, because Grado was racially biased and influenced the decision to terminate Peters, petitioner was liable for racial discrimination in violation of Title VII.

The district court granted summary judgment to petitioner. Pet. App. 32a-76a. The court determined that, under the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), respondent had failed to create a genuine issue of material fact with regard to whether the reasons offered by petitioner for Peters' firing were pretextual. Pet. App. 55a-75a. The court did determine that respondent had "created a genuine issue of fact whether Grado was biased against African Americans." *Id.* at 71a. The court reasoned, however, that Edgar, rather than Grado, had made the decision to terminate Peters, and rejected respondent's contention that Edgar had acted as a "rubber stamp" for Grado's prejudice. *Id.* at 66a. The court noted that, "[i]n this case, Grado did not make any recommendations to Edgar," and added that "Edgar attempted to do at least some independent investigation by consulting with Pedersen regarding Peters' disciplinary history." *Id.* at 66a-67a. The court also concluded that respondent had failed to "direct[] the Court's attention to any evidence in the record linking Grado's potential bias to his decision to involve Edgar in the situation with Peters." *Id.* at 67a.

3. The court of appeals reversed and remanded. Pet. App. 1a-31a.

Like the district court, the court of appeals reasoned that "[t]he sole issue * * * is whether [respondent] has made a sufficient showing that [petitioner's] proffered explanation is a pretext for race discrimination." Pet. App. 14a. The court of appeals noted that "it is undis-

puted that Ms. Edgar, who formally made the termination decision, * * * had no idea that Mr. Peters is black" and "therefore could not have acted for racially discriminatory reasons." *Ibid.* Thus, the court reasoned, respondent was required to show not only that "Mr. Grado harbored racial animus toward black employees," but also that "his racial animus should be imputed to [petitioner] despite the fact that Mr. Grado had no power to terminate anyone." *Ibid.*

The court of appeals noted that, while it had not previously addressed the question, other courts had "overwhelmingly" recognized claims under Title VII based on the bias of a subordinate employee. Pet. App. 15a. The court reasoned that imposing liability based on subordinate bias not only "comport[s] with the basic agency principles incorporated by statute into Title VII," *id.* at 16a, but also "advances the purposes of Title VII," *id.* at 17a. The court noted that liability for subordinate bias would "encourag[e] employers to verify information and review recommendations before taking adverse employment actions against members of protected groups." *Ibid.*

The court of appeals then explained that, "[d]espite broad support for some theory of subordinate bias liability, our sister circuits have divided as to the level of control a biased subordinate must exert over the employment decision." Pet. App. 18a. The court noted that "[s]ome courts take a lenient approach, formulating the inquiry as whether the subordinate 'possessed leverage, or exerted influence, over the titular decisionmaker.'" *Ibid.* (quoting *Russell* v. *McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000)). "At the opposite extreme," the court observed, "the Fourth Circuit has held that an employer cannot be held liable even if a biased

subordinate exercises 'substantial influence' or plays a 'significant' role in the employment decision." *Id.* at 19a (citing *Hill* v. *Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) (en banc), cert. dismissed, 543 U.S. 1132 (2005)). Under that approach, the court explained, any employer can be held liable only if "the decisionmaker [was] so completely beholden to the subordinate 'that the subordinate is the actual decisionmaker.'" *Id.* at 20a (quoting *Hill*, 354 F.3d at 290).

The court of appeals ultimately concluded that the correct inquiry was whether "the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action." Pet. App. 20a-21a. The court rejected the Fourth Circuit's approach on the ground that it excessively focused on the identity of the "decisionmaker" and would "allow[] employers to escape liability even when a subordinate's discrimination is the sole cause of an adverse employment action, on the theory that the subordinate did not exercise complete control over the decisionmaker." *Id.* at 20a. The court emphasized that, under its approach, "an employer can avoid liability by conducting an independent investigation of the allegations against an employee" and that "simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory." *Id.* at 21a.

Applying its standard for subordinate-bias liability, the court of appeals determined that respondent had presented sufficient evidence to survive summary judgment. Pet. App. 22a-31a. The court of appeals first agreed with the district court that respondent "has raised a genuine issue of fact concerning Mr. Grado's racial animus." *Id.* at 23a. Although the court of ap-

peals did not "necessarily believe that each of the incidents [identified by respondent] would support a charge of discrimination in isolation," it concluded that, "taken as a whole, this evidence of racial comments and disparate treatment of black merchandisers creates a genuine issue of fact regarding Mr. Grado's racial bias." *Id.* at 26a. The court then concluded that respondent had also created a genuine issue of fact as to whether "Mr. Grado's bias translated into discriminatory actions that caused Mr. Peters' termination." *Ibid.* The court reasoned that, "[i]f a jury credits the testimony of Mr. Peters and Mr. Katt, and thus concludes that Mr. Grado lied to Ms. Edgar, it could also find that the additional claims about Mr. Peters' conduct caused the termination." *Id.* at 30a. Finally, the court rejected the argument that Edgar had conducted an independent investigation that defeated the inference that Grado's bias tainted the decision to discharge Peters. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-17) that there is a conflict among the courts of appeals concerning the appropriate standard for subordinate-bias liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Although there is a circuit conflict on that issue, that conflict is not as extensive as petitioner asserts. In any event, this case would constitute a poor vehicle for resolution of that conflict because it arises in an interlocutory posture (and it is therefore unclear whether resolution of that conflict would affect the outcome of this case). Further review is therefore unwarranted.

1. Under Title VII, it is unlawful for an employer, *inter alia*, to "discharge any individual * * * because of such individual's race." 42 U.S.C. 2000e-2(a)(1). All

of the courts of appeals to have considered the issue have held that an employer can be liable under Title VII (or other similarly worded federal discrimination statutes) based on the alleged bias of a subordinate employee: *i.e.*, an employee who did not personally take the adverse employment action. See Pet. App. 15a (citing cases). In determining whether an employer should be held liable on a theory of subordinate bias, most of the courts of appeals, like the court of appeals in this case, have focused on the causal connection between the alleged bias and the adverse employment action. See, *e.g.*, *Stimpson* v. *City of Tuscaloosa*, 186 F.3d 1328, 1331 (11th Cir. 1999) (noting that "the plaintiff must prove that the discriminatory animus behind the recommendation * * * was an actual cause of the other party's decision to terminate the employee"), cert. denied, 529 U.S. 1053 (2000); *Wilson* v. *Stroh Cos.*, 952 F.2d 942, 946 (6th Cir. 1992) (stating that "[t]he determinative question is whether [the plaintiff] has submitted evidence that [the subordinate employee's] racial animus was a cause of the termination").

To be sure, those courts of appeals have phrased the relevant inquiry in various ways, such as whether the subordinate employee had "influence" on the decisionmaking process, see, *e.g.*, *Abramson* v. *William Paterson Coll.*, 260 F.3d 265, 286 (3d Cir. 2001); *Santiago-Ramos* v. *Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000); *Griffin* v. *Washington Convention Ctr.*, 142 F.3d 1308, 1310 (D.C. Cir. 1998), or whether the subordinate employee was "involved" in that process, see, *e.g.*, *Bergene* v. *Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001); *Stacks* v. *Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir. 1994). But the

thrust of the inquiry under any of those formulations is whether there was a causal connection between the alleged bias and the adverse employment action.

While petitioner contends that those courts "widely differ[]" on the appropriate standard for subordinate-bias liability, Pet. 14, and while the court below criticized the formulations of some of those courts as excessively "lenient," Pet. App. 18a-19a, those courts do not appear to be in genuine conflict with each other, because the slightly different formulations used by those courts would not necessarily lead to different results in any given case. Indeed, many of those courts have used different formulations interchangeably—even in the course of a single opinion. See, *e.g.*, *Noble* v. *Brinker Int'l, Inc.*, 391 F.3d 715, 723 (6th Cir. 2004) (stating that the determinative question is whether the plaintiff submitted evidence that the subordinate employee's bias "was a cause of the termination," or, "[i]n other words," whether the employee's bias "somehow influenced" the ultimate decisionmaker) (quoting *Wilson*, 952 F.2d at 946), cert. denied, 126 S. Ct. 353 (2005); *Russell* v. *McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) (framing the inquiry as whether the subordinate "possessed leverage, or exerted influence, over the titular decisionmaker," but "look[ing] to who actually made the decision or caused the decision to be made"); *Shager* v. *Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (asserting that the relevant inquiry was whether there was a "causal link between [the subordinate's] prejudice and [the] discharge," but proceeding to assess whether the adverse employment action was "tainted" or "influenced" by the subordinate's prejudice).

2. As petitioner contends (Pet. 12-14), the decisions of the majority of courts of appeals do conflict with the

Fourth Circuit's decision in *Hill* v. *Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (2004) (en banc), cert. dismissed, 543 U.S. 1132 (2005). In *Hill*, the Fourth Circuit expressly refused to construe Title VII (or the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*) to "allow a biased subordinate who has no supervisory or disciplinary authority and who does not make the final * * * decision to become a decisionmaker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the * * * decision." *Hill*, 354 F.3d at 291. Instead, stating that it was "guided by agency principles," *id.* at 287, the Fourth Circuit held that, in order to pursue a claim of subordinate-bias liability, the plaintiff "must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer." *Id.* at 291.*

Since the Fourth Circuit's decision in *Hill*, two courts of appeals (including the court below) have expressly rejected the Fourth Circuit's standard. See Pet. App. 20a-21a; *Lust* v. *Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004). That conflict might warrant this Court's review in an appropriate case in which the choice between the Fourth Circuit's standard for subordinate-bias liability and the standard of another court of appeals would clearly be outcome-dispositive.

3. This case, however, would constitute a poor vehicle for addressing any conflict because it arises in an

---

* After the plaintiff in *Hill* petitioned for certiorari, this Court invited the Solicitor General to file a brief expressing the views of the United States. 542 U.S. 935. Before the Solicitor General filed his brief, however, the petition was dismissed pursuant to Rule 46.1. 543 U.S. 1132.

interlocutory posture. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). The interlocutory posture of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition).

The court of appeals reversed the district court's decision to grant summary judgment to petitioner and remanded for trial. Pet. App. 31a. In doing so, the court of appeals determined only that respondent had created a genuine issue of fact as to (1) whether Grado was racially biased and (2) whether there was a sufficient causal connection between Grado's bias and Peters' termination. *Id.* at 26a. Although respondent believes that the evidence supports this enforcement action, the jury could disagree and conclude at trial either that Grado was not racially biased or that there was an insufficient causal connection between the bias and the termination. It is clear, moreover, that petitioner intends to advance both of those arguments on remand. See, *e.g.*, Pet. 2-4.

Should the jury agree with petitioner on either point, there would be nothing for this Court to review, because respondent would lose under any liability standard. On the other hand, should the jury find in favor of respondent, and should judgment be entered for respondent and affirmed on appeal, petitioner can seek this Court's review on the question presented (and any other questions) in a subsequent petition. Such a petition, if filed, would present the Court with a fully developed factual record that would better enable the Court to assess

whether the asserted circuit conflict is implicated by this case, and, if so, whether further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

RONALD S. COOPER
General Counsel

VINCENT J. BLACKWOOD
Acting Associate General Counsel

LORRAINE C. DAVIS
Assistant General Counsel

SUSAN R. OXFORD
Attorney
Equal Employment Opportunity Commission

DECEMBER 2006

No. 06-341

In the Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

ERIC TODD PRESNELL
Counsel of Record
KARA E. SHEA
MILLER & MARTIN PLLC
1200 ONE NASHVILLE PLACE
150 FOURTH AVENUE NORTH
NASHVILLE, TENNESSEE 37219
(615) 244-9270

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Argument 1

I. The Interlocutory Nature of the Judgment Should Not Prevent Certiorari Review 1

II. This Case—in its Current Posture—Represents the Optimal Situation for Deciding this Issue 4

A. This case would be decided differently under the prevailing standard in the Fourth Circuit 4

B. The *Sawicki* petition does not present this Court with the proper record and issues to determine the appropriate standard of subordinate bias liability 6

III. Respondent's Silence on Key Issues Weighs in Favor of Review 9

Conclusion 10

TABLE OF AUTHORITIES

Cases

Abbott Laboratories v. Portland Retail Druggists Ass'n, 425 U.S. 1 (1976) 3

American Constr. Co. v. Jacksonville, Tampa & Key West Ry., 148 U.S. 372 (1893) 2

Blackledge v. Allison, 431 U.S. 63 (1977) 3

Brotherhood of Locomotive Firemen v. Bangor & Aroostook RR., 389 U.S. 327 (1967) 2

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) 3

California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) 3

Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) 6-7

Estelle v. Gamble, 429 U.S. 97 (1976) 3

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 2

Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277 (4th Cir. 2004) . . . . . *passim*

KSR International Co. v. Teleflex Inc.,
126 S.Ct. 2965 (2006) 4

Land v. Dollar,
330 U.S. 731 (1947) 3

Larson v. Domestic & Foreign Commerce Corp.,
337 U.S. 682 (1949) 3

Lust v. Sealy, Inc.,
383 F.3d 580 (7th Cir. 2004) 1

Mazurek v. Armstrong,
520 U.S. 968 (1997) 3

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 6, 8

Occidental Life Ins. Co. v. EEOC,
432 U.S. 355 (1977) 3

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) 8, 10

Russell v. McKinney Hosp. Venture,
235 F.3d 219 (5th Cir. 2000) 9

School Board of Nassau County v. Arline,
480 U.S. 273 (1987) 3

St. Paul Fire & Marine Ins. Co. v. Barry,
438 U.S. 531 (1978) 3

Time, Inc. v. Pape,
401 U.S. 279 (1971) 3

Town of Newton v. Rumery,
480 U.S. 386 (1987) 3

United Air Lines, Inc. v. McMann,
434 U.S. 192 (1977) 3

United States v. Orleans,
425 U.S. 807 (1976) 3

Statutes

28 U.S.C. § 1254(1) 3

Other

17 C. Wright, A Miller, & E. Cooper, Federal Practice
and Procedure § 4036 . . . . . 3, 4

R. Stern, E. Gressman, S. Shapiro, & K. Geller,
Supreme Court Practice § 4.18 3

ARGUMENT

BCI understands that this Court will consider simultaneously, at its January 5, 2007 conference, the petitions in the case at bar and in *Sawicki v. Morgan State University* (Case No. 06-306). For the reasons set forth below, neither the Respondent's brief in response to BCI's petition nor the petitioner's reply in the *Sawicki* case, both of which seek denial of BCI's petition, militate against granting BCI's request for review. Rather, BCI submits that its petition should be granted because there is a clear split of authority amongst the circuits[1] with respect to the important federal employment law issue of subordinate bias liability, and the BCI case—in its current posture—presents this Court with the optimal situation to provide a definitive standard for all employers, public and private.

I. THE INTERLOCUTORY NATURE OF THE JUDGMENT SHOULD NOT PREVENT CERTIORARI REVIEW

Both the Respondent in the case at bar and the petitioner in *Sawicki* argue that, because the Tenth Circuit reversed a grant of summary judgment and remanded the case for further proceedings under its new rule on subordinate bias liability,

---

[1] The respondent argues, to some degree, that the circuit split on this issue is "not extensive." (Respondent's Brief, p. 9). This argument, however, is directly opposite of the views expressly held by, at least, judges on the Fourth, Seventh, and Tenth Circuits. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 299 (4th Cir. 2004) (Michael, J., dissenting) (noting that the majority's decision "puts us at odds with virtually every other circuit"); *EEOC v. BCI Coca-Cola Bottling Company of Los Angeles*, (McConnell, J.) (App. 19a) (characterizing the Fourth and Fifth circuits as being at "opposite extremes"); *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004) (Posner, J.) (stating that the *Hill* standard "is not the view of this court").

the case is of an interlocutory posture and, therefore, certiorari should not be granted. (Respondent's Brief, p. 12-14; *Sawicki* Reply Brief, pp. 7-8). None of the primary cases cited by the Respondent, however, involved the same procedural status as the case at bar. (*See id.*; *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (court of appeals remanded so that district court could determine whether union was, in fact, in contempt); *American Constr. Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893) (court of appeals remanded for modification of injunction and restraining order)). Another case cited by the Respondent, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), is likewise inapposite. In that case, the Court was discussing its denial (without comment) of a previous petition for writ of certiorari in the same case. The Court stated that issues raised in the first petition were not barred by the law of the case doctrine and, in doing so, offered a variety of potential reasons for the prior denial—not just the reasons cited by the Respondent:

> The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application; besides which, it appears, by reference to our files, that the application was opposed by the present petitioner upon the ground that the case, however important to the parties, involved no question of public interest and general importance, nor any conflict between the decisions of state and Federal courts, or between those of Federal courts of different circuits.

240 U.S. at 258. In short, the cases relied upon by the Respondent do not in any way foreclose this Court's review of the case at bar.

Moreover, the statutory basis for this Court's jurisdiction in this case does not contain the impediment urged by the Respondent. *See* 28 U.S.C. § 1254(1). Indeed, "there is no requirement that there be a 'final' decision; once a case has come to be in the court of appeals, the Supreme Court may grant certiorari to review interlocutory decisions." 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4036, p. 10 (2d ed. 1988). As this Court has noted, its "cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts." *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (citing cases and R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice § 4.18 (7th ed. 1993)).

Following this maxim, this Court has previously granted certiorari review in a case involving an important question of federal employment law that was in the same procedural posture (reversal of a grant of summary judgment) as the case at bar. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). This Court has also granted certiorari review in a case, like the one at bar, wherein the EEOC filed suit, lost a motion for summary judgment, and obtained a reversal in the court of appeals. *See Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977). In fact, this Court has on many occasions agreed to review a case where the court of appeals reversed a summary disposition by the district court.[2]

---

[2] *See, e.g., Town of Newton v. Rumery*, 480 U.S. 386 (1987); *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978); *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977); *Blackledge v. Allison*, 431 U.S. 63 (1977); *Estelle v. Gamble*, 429 U.S. 97 (1976); *United States v. Orleans*, 425 U.S. 807 (1976); *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949); *Land v. Dollar*, 330 U.S. 731 (1947).

That occasion presented itself again in the present term, and this Court again granted a petition for writ of certiorari in a case where the court of appeals reversed a grant of summary judgment. *See KSR Int'l Co. v. Teleflex Inc.*, 126 S.Ct. 2965 (2006). Despite the procedural posture of the *KSR* case, and contrary to its position in the case at bar, the Solicitor General submitted a brief as amicus curiae wherein it took the position that this Court *should* grant KSR International's petition for writ of certiorari. *See* Brief for the United States as Amicus Curiae, KSR International Co. v. Teleflex Inc., 126 S.Ct. 2965 (2006) (No. 04-1350), 2006 WL 1455388.

As the Respondent's positions in this case and in *KSR* demonstrate, "[r]eview is granted or denied according to a wide range of concerns, some of which bear on the finality of the disposition below, and many of which do not." 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, § 4036, pp. 31-32 (2d ed. 1988).

II. THIS CASE—IN ITS PRESENT POSTURE—REPRESENTS THE OPTIMAL SITUATION FOR DECIDING THIS ISSUE

The importance of the issue in this case, along with the circuit conflict, warrants immediate review rather than waiting for a remand, trial on the merits, and a second venture through the appellate process.

A. This case would be decided differently under the prevailing standard in the Fourth Circuit

Both the Respondent and the petitioner in *Sawicki* state that denying review here would permit the record to become more fully developed at trial. Neither of these parties, however, explain what part of the pertinent record would become more developed. The record before the district court and court of appeals was, in fact, fully developed. The parties engaged in extensive discovery, with the key players,

including the undisputed decisionmaker, being deposed twice. All of the evidence surrounding the termination decision, including the level of influence each person exerted, is included in the record. In short, all of the evidence that is necessary to make a decision exists, and there is no need to further develop the record before this Court can make a decision on the appropriate standard of subordinate bias liability.

A remand here would also be counterproductive because the trial would occur and a liability decision made under the wrong standard. As discussed below (section III(A)), the Respondent did not argue in its brief that the Tenth Circuit's standard is the correct standard; rather, it suggests that a trial should occur and then this Court can review whether the correct standard was applied. Given the state of the record, a trial is simply not a worthwhile exercise in this case.

This case would be decided differently, under the present record, if, for example, the *Hill* standard was applied. In *Hill*, the Fourth Circuit held that, in order to prove liability under a subordinate bias theory, a plaintiff "must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer." 354 F.3d at 291. In the case at bar, it is undisputed that Human Resources Manager Patricia Edgar was the sole decisionmaker, and that the allegedly biased subordinate did not make any type of recommendation or otherwise provide his thoughts to Ms. Edgar regarding whether and to what extent she should issue discipline. (App. 44a, 66a). It is also undisputed that Ms. Edgar (who was based at a different location than the affected employee) did not know that the employee she terminated was African-American. (App. 65a-70a). Under this record, it is clear that the Respondent would not be able to meet its burden

under the *Hill* standard and, as such, the case at bar would be decided differently under that standard. Accordingly, this case presents this Court with a ripe issue that needs no further factual development.

B. The *Sawicki* petition does not present this Court with the proper record and issues to determine the appropriate standard of subordinate bias liability

The petitioner in *Sawicki* argues that its case "provides a more appropriate vehicle for deciding the legal issue in question than does *BCI Coca-Cola*." (*Sawicki* Reply Brief, p. 7). The sole support for this statement is that *BCI Coca-Cola* "is an interlocutory appeal." (*Id.*). An examination of the entire circumstances of the district and appellate court decisions in *Sawicki*, independent of *BCI Coca-Cola*, reveals that it offers this Court a poor avenue to consider and decide the subordinate bias liability issue. Moreover, when compared with the state of the record and the decisions of the lower courts in *BCI Coca-Cola* (as explained above), the *Sawicki* case becomes an even less attractive option for review.

The plaintiff in *Sawicki* sued a single-state employer, Morgan State University, in a teacher-tenure case, asserting multiple claims, including claims under Title VII and under 42 U.S.C. § 1983. Many claims were dismissed by the district court early in the litigation, and ultimately the Title VII claims and § 1983 claims were dismissed via summary judgment in a decision that was not published, even in an electronic format. While the petitioner in *Sawicki* highlights the district court's citation of the Fourth Circuit's decision in *Hill*, the district court actually decided to dismiss the plaintiff's Title VII claims on multiple grounds, including under a single motive analysis under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and under a mixed motive analysis under *Desert Palace, Inc. v. Costa*, 539 U.S.

90 (2003). Importantly, the district court based its decision upon the Fourth Circuit's admonition that courts must be "reluctan[t] to second-guess the inherently subjective tenure decisions of academic institutions." (*Sawicki* Petition, App. 23a-24a). In fact, the district court expressly ruled that, "[h]eeding both the Fourth Circuit's direction on judicial review of tenure decisions and the recent en banc holding in *Hill*, this Court concludes that no reasonable juror could find that the circumstances surrounding Plaintiff's tenure denial amount to unlawful discrimination." (*Sawicki* Petition, App. 24a).[3]

The plaintiff's appeal to the Fourth Circuit was pro se and involved a myriad of issues, including the district court's March 15, 2004 memorandum and order granting defendant's Rule 12 motion to dismiss some, but not all, claims, the July 7, 2004 order denying her motion for reconsideration, the March 11, 2005 order denying in part her motion for sanctions, and the August 8, 2005 memorandum and order granting defendant's motion for summary judgment on all remaining claims. (Amended Notice of Appeal, Case No. WMN-03-1600, Docket Entry No. 121). The Fourth Circuit ordered that there would be no oral argument, and that the case would be submitted on informal briefs. (Case No. 05-891, Order, August 18, 2005). Under this order, the respondent was not even required to file a response brief.

---

[3] Interestingly, the petitioner in *Sawicki* criticizes the *Sawicki* respondent for "omit[ting] key prefatory language" of this quote in its response brief. (*Sawicki* Reply Brief, p. 4). In adding the "key prefatory language," however, the *Sawicki* petitioner omits the district court's reference to its reliance upon the "Fourth Circuit's direction on judicial review of tenure decisions." (*Compare Sawicki* Reply Brief, p. 4 *with Sawicki* Petition, App. 24a). This omission is glaring because the fact that *Sawicki* involves a teacher tenure issue adds a dimension to the case that makes it less appropriate for review in the subordinate bias liability context.

(*Id.*). The Fourth Circuit later issued its per curiam opinion, which is also unpublished, wherein it simply said that it reviewed the record, found no reversible error, and affirmed "on the reasoning of the district court." (*Sawicki* Petition, App. 2a).

This procedural history illustrates that the *Sawicki* petition does not constitute the optimal avenue to decide the appropriate standard for subordinate bias liability. The Fourth Circuit did not engage in any written analysis of any part of the district court's decision. Although it relied upon the district court's "reasoning," the Fourth Circuit did not explain whether, and to what degree, that included the teacher-tenure rule, the *McDonnell Douglas* analysis, the mixed motive analysis, or the district court's discussion of *Hill*. In other words, in *Sawicki*, there is no appellate court analysis of the subordinate bias liability standard for this Court to review on certiorari. Moreover, and importantly, neither the district court nor the appellate court discussed the level of influence that the supposedly bias subordinates had over the decision to defer her tenure. In reality, therefore, the *Sawicki* petitioner is asking this Court to review the *Hill* standard through the vehicle of a district court judgment—not an appellate court judgment—wherein the facts are not developed to the point of knowing the level of influence of the subordinate.

The case at bar, therefore, presents the optimal avenue to review this issue. The record is fully developed, and both the Tenth Circuit and the district court specifically dealt with the standard for subordinate bias liability. The Tenth Circuit also addressed the application of *Reeves*, whereas the *Sawicki* decisions did not address this related matter. Furthermore, whereas BCI demonstrated above that this case would have a different outcome under the application of a different standard, the *Sawicki* petitioner did not make the same

demonstration. In short, the case at bar is not only ripe, but is also the better case to decide this important issue of federal employment law.

III. RESPONDENT'S SILENCE ON KEY ISSUES WEIGHS IN FAVOR OF REVIEW

The Respondent remained silent on two key issues, and this silence is the equivalent of a concession that the subordinate bias liability issue—via the case at bar—is ripe for review.

First, although the Respondent recognized that the Tenth Circuit's opinion rejected the standard adopted in *Hill* (Respondent's Brief, p. 12), it stopped short of arguing that the Tenth Circuit's standard is, in fact, the correct standard. While the EEOC at the court of appeals level argued in favor of the standard applied by the Fifth Circuit, *see* Brief for EEOC, *EEOC v. BCI Coca-Cola Bottling Co.*, (No. 04-2220), at p. 33 (citing *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 221 (5th Cir. 2000)), the Solicitor General did not embrace that standard in its response.[4] Notably, the Solicitor General also did not embrace the Tenth Circuit's standard, which conflicts with the Fifth Circuit's opinion, as the appropriate standard to be applied in subordinate bias liability cases. Had the Respondent believed that, on remand, the trial of this case would be conducted using the correct standard, then surely that argument—and the reasons therefore—would have been made. This omission weighs in favor of this Court's review so that the federal government, as a public employer, can offer its views on when the actions

---

[4] The EEOC took a similar position as amicus curiae in the *Hill* case. *See Hill*, 354 F.3d at 289. The *Hill* court declined to adopt the standard proposed by the EEOC.

of a biased subordinate can result in liability to the employer under Title VII and other federal anti-discrimination laws.

Second, the Respondent did not address the conflict between the Tenth and Fourth circuits over the proper application of *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (*See* Petition, pp. 12-14). Whereas the Fourth Circuit relied upon part of this Court's language in *Reeves*, 354 F.3d at 288-289, the Tenth Circuit found such reliance to be "peculiar" and "misplaced." (App. 20a). The silence on this issue likewise weighs in favor of this Court granting review so that this matter can be resolved when defining the appropriate standard of subordinate bias liability.

CONCLUSION

For all of the reasons set forth above, as well as the reasons set forth in its petition, BCI Coca-Cola Bottling Company of Los Angeles respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

ERIC TODD PRESNELL
Counsel of Record
KARA E. SHEA
MILLER & MARTIN PLLC
1200 ONE NASHVILLE PLACE
150 FOURTH AVENUE NORTH
NASHVILLE, TENNESSEE 37219
615-244-9270

No. 06-341

Supreme Court, U.S.
FILED
FEB 20 2007
OFFICE OF THE CLERK

In the Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Supreme Court, U.S.
FILED
FEB 20 2007
OFFICE OF THE CLERK

JOINT APPENDIX

PAUL D. CLEMENT
Counsel of Record
SOLICITOR GENERAL
UNITED STATES
DEPARTMENT OF JUSTICE
950 PENNSYLVANIA AVE., N.W.
ROOM 5614
WASHINGTON, DC 20530-0001
(202) 514-2217

Counsel for Respondent

ERIC TODD PRESNELL
Counsel of Record
KARA E. SHEA
T. HAROLD PINKLEY
DAVID L. JOHNSON
MILLER & MARTIN PLLC
1200 ONE NASHVILLE PLACE
150 FOURTH AVENUE NORTH
NASHVILLE, TENNESSEE 37219
(615) 244-9270

Counsel for Petitioner

February 20, 2007

Petition for Certiorari Filed September 5, 2006
Petition for Certiorari Granted January 5, 2007

THOMAS C. GOLDSTEIN
AKIN GUMP STRAUSS
HAUER & FELD LLP
ROBERT S. STRAUSS BUILDING
1333 HAMPSHIRE AVENUE, NW
WASHINGTON, D.C. 20036
(202) 887-4060

Co-Counsel for Petitioner

TABLE OF CONTENTS

Relevant Docket Entries . . . . . JA 1

Complaint . . . . . JA 4

Answer . . . . . JA 10

Motion for Summary Judgment . . . . . JA 15

Exhibit A - Declaration of Patricia K. Edgar . . JA 17

Exhibit B - Declaration of Cesar Grado . . . . . JA 29

Exhibit C - Declaration of Sherry Pedersen . . . JA 44

Exhibit E - Excerpts of Deposition of Stephen Brian Peters . . . . . JA 64

Exhibit F - Excerpts of Deposition of Patricia K. Edgar . . . . . JA 80

Exhibit G - Excerpts of Deposition of Sherry Pedersen . . . . . JA 83

Exhibit H - Excerpts of Deposition of Cesar Grado . . . . . JA 86

Exhibit I - Excerpts of Deposition of Jeff Katt . JA 96

EEOC Appendix in Response to Summary Judgment Motion . . . . . JA 102

Exhibit A - Affidavit of Stephen B. Peters . . . . JA 104

Exhibit B - Letter Dated July 12, 2002 from BCI to the EEOC . . . . . JA 114

Exhibit E - Supplemental Data Sheets . . . . . JA 118

Exhibit F - BCI Ethnicity/Race Employee Information . . . . . JA 122

Exhibit H - Excerpts of Deposition of Sherry Pedersen . . . . . JA 135

Exhibit I - BCI Response to New Mexico Department of Labor . . . . . JA 147

Exhibit J - Letter Dated November 15, 2002 from BCI to EEOC . . . . . JA 150

Exhibit K - Excerpts of Deposition of Patricia K. Edgar . . . . . JA 153

Exhibit N - Excerpts of Deposition of Donald R. Bateluna . . . . . JA 177

Exhibit O - Affidavit of James Young . . . . . JA 193

Exhibit P - Affidavit of Bryan Esquibel . . . . . JA 196

Exhibit Q - Affidavit of Michael Wilson . . . . . JA 199

Exhibit R - Notice of Claim Determination . . . JA 202

Exhibit S - Excerpts of Deposition of Stephen Peters . . . . . JA 204

Exhibit T - Excerpts of Deposition of Cesar Grado . . . . . JA 235

Exhibit U - Excerpts of Deposition of Jeff Katt . . . . . JA 248

Exhibit V - Excerpts of Deposition of Oran Sage . . . . . JA 280

Exhibit W - Doctor's Note and Pharmacy Prescription . . . . . JA 292

Reply by Defendant BCI Coca-Cola to Response to Motion for Summary Judgment

Supplemental Declaration of Sherry Pedersen . . JA 294

Excerpts Deposition of Oran Sage . . . . . JA 307

Excerpts Deposition of Jeff Katt . . . . . JA 316

Excerpts Deposition of Stephen Peters . . . . . JA 322

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Order of the United States Court of Appeals for the Tenth Circuit, dated June 7, 2006 . . . . . 1a

Memorandum Opinion and Order of the United States District Court for the District of New Mexico, dated June 10, 2004 . . . . . 32a

RELEVANT DOCKET ENTRIES

U.S. District Court
District of New Mexico/ CIVIL DOCKET FOR CASE #:
1:02-cv-01644-JB-RHS

Date Filed	#	Docket Text
12/30/2002	1	COMPLAINT for civil rights w/jury demand (0 Summons(es) issued) (referred to Magistrate Judge Lorenzo F. Garcia) (ed) (Entered: 12/31/2002)
03/19/2003	3	ANSWER by defendant BCI Coca-Cola [1-1]; jury demand (mlk) (Entered: 03/20/2003)
02/19/2004	65	MOTION by defendant Coca-Cola Bottling for summary judgment (sl) (Entered: 02/19/2004)
02/19/2004	66	MEMORANDUM by defendant Coca-Cola Bottling in support of motion for summary judgment [65-1] (sl) (Entered: 02/19/2004)
03/17/2004	72	MOTION by plaintiff to exceed page limitation for response and exhibits in its opposition to deft's motion for summary judgment * (sl) (Entered: 03/18/2004)
03/17/2004	73	RESPONSE by plaintiff to deft's motion for summary judgment [65-1] * (sl) (Entered: 03/18/2004)
03/19/2004	74	APPENDIX filed by plaintiff re response [73-1] (sl) Modified on 03/22/2004 (Entered: 03/19/2004)
03/19/2004	75	ORDER by District Judge James O. Browning granting pltf's motion to exceed page limitation for response and exhibits in its opposition to deft's motion for summary

		judgment [72-1] all counsel) (sl) (Entered: 03/19/2004)
03/23/2004	76	OPPOSED MOTION by plaintiff to exceed page limitation for exhibits in its opposition to deft's motion for summary judgment * (sl) (Entered: 03/23/2004)
03/31/2004	77	REPLY by defendant BCI Coca-Cola to response to motion for summary judgment [65-1] (sl) (Entered: 04/01/2004)
06/10/2004	81	MEMORANDUM, OPINION, AND ORDER: by District Judge James O. Browning granting deft BCI'a motion for summary judgment [65-1] dismissing with prejudice deft Coca-Cola Bottling Company of Los Angeles (BCI) (cc: all counsel*) (sl) Modified on 06/14/2004 (Entered: 06/14/2004)
06/30/2004	82	FINAL JUDGMENT: by District Judge James O. Browning dismissing case (cc: all counsel*) (sl) (Entered: 06/30/2004)
08/27/2004	87	NOTICE OF APPEAL by pltf from Dist. Court decision [82-2] and [81-1]; Fees not necessary - Distribution as required. (cc: all counsel) (mjr) (Entered: 08/27/2004)
08/02/2006	93	CERTIFIED Copy of judgment from USCA reversing and remanding the Decision of the District Court [Appeal [87-1] (case re-opened 08/02/06 cc: KS) (pg) Modified on 08/03/2006 (Entered: 08/03/2006)

United States Court of Appeals for the 10th Circuit
Court of Appeals Docket #: 04-2220

Date Filed	Docket Text
5/12/05	[1807750] Appellee's brief filed by BCI Coca-Cola.
6/9/2005	[1815750] Appellant's reply brief filed by Equal Employment.
11/14/2005	[1862710] Case argued by Susan R. Oxford, for appellant and by E. Todd Presnell for appellee; Submitted to Judge Lucero, McKay, McConnell. (ss)
6/7/2006	[1925085] Terminated on the Merits after Oral Hearing; Judgment is Reversed and case is Remanded; Written, Signed, Published. Lucero; McKay; McConnell, authoring judge. [04-2220] Parties served by mail on 6/7/06.
7/31/2006	[1941294] Mandate issued.
9/12/2006	[1955062] Petition for writ of certiorari filed on 9/5/06. Supreme Court Number 06-341.
1/11/07	[1991527] Supreme Court order dated 1/5/07 granting certiorari filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ-02-1644

[Filed December 30, 2002]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, d/b/a PHOENIX COCA-COLA BOTTLING COMPANY and COCA-COLA BOTTLING COMPANY OF ALBUQUERQUE, Defendant.	)

COMPLAINT
JURY TRIAL DEMANDED

NATURE OF THE ACTION

This is an action under Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 to correct unlawful employment practices on the basis of race, and to provide appropriate relief to Charging Party Stephen Peters who was adversely affected by such practices. As alleged with greater particularity in paragraph seven below, BCI Coca-Cola Bottling Company of Los Angeles, which does business under the names of Phoenix Coca-Cola Bottling Company and Coca-Cola Bottling Company of Albuquerque ("Defendant"), subjected Stephen B. Peters to disparate

treatment in the terms, conditions, and privileges of employment because of his race, African American. The Commission also alleges that Defendant discharged Mr. Peters because of his race, African American.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343, and 1345. This action is authorized and instituted pursuant to Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(l) and (3) ("Title VII") and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981A.

2. The employment practices alleged to be unlawful were committed within the jurisdiction of the United States District Court for the District of New Mexico.

PARTIES

3. Plaintiff, the Equal Employment Opportunity Commission (the "Commission"), is the agency of the United States of America charged with the administration, interpretation and enforcement of Title VII, and is expressly authorized to bring this action by Section 706(f)(1) and (3) of Title VII, 42 U.S.C. § 2000e-5(f)(1) and (3).

4. At all relevant times, Defendant, BCI Coca-Cola Bottling Company of Los Angeles, a Delaware corporation, which does business under the trade names of Phoenix Coca-Cola Bottling Company and Coca-Cola Bottling Company of Albuquerque, has continuously been and is now doing business in the State of New Mexico and the City of Albuquerque, and has at all relevant times had at least fifteen employees.

5. At all relevant times, Defendant has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Sections 701(b), (g) and (h) of Title VII, 42 U.S.C. §§ 2000e(b), (g) and (h).

STATEMENT OF CLAIMS

6. More than thirty days prior to the institution of this lawsuit, Stephen B. Peters filed a charge with the Commission alleging violations of Title VII by Defendant. All conditions precedent to the institution of this lawsuit have been fulfilled.

7. Since at least October 1999, Defendant engaged in unlawful employment practices at its Albuquerque, New Mexico facility, in violation of Section 703(a) of Title VII, 42U.S.C. § 2000e-2(a). These practices include:

a. disparate treatment of Stephen B. Peters in the terms, conditions, and privileges of his employment, including, threatening Mr. Peters with harsh discipline for not working a scheduled day off, failing to apply progressive discipline policies to Mr. Peters, and applying different attendance standards to Mr. Peters because of his race, African American; and

b. discharging Stephen B. Peters because of his race, African American.

8. The effect of the practices complained of in paragraph seven above has been to deprive Stephen B. Peters of equal employment opportunities and otherwise adversely affect his status as an employee because of his race, African American.

9. The unlawful employment practices complained of in paragraph seven above were intentional.

10. The unlawful employment practices complained of in paragraph seven above were done with malice or with reckless indifference to the federally protected rights of Stephen B. Peters.

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, successors, assigns, and all persons in active concert or participation with it, from engaging in any employment practice which discriminates on the basis of race.

B. Order Defendant to institute and carry out policies, practices, and programs which provide equal employment opportunities for African Americans, and which eradicate the effects of its past and present unlawful employment practices.

C. Order Defendant to make whole Stephen B. Peters, by providing appropriate back pay with prejudgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to front-pay in lieu of reinstatement.

D. Order Defendant to make whole Stephen B. Peters, by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices described in paragraph seven above, including, but not limited to, compensation for the financial losses to Mr. Peters related to early withdrawal from his 401K Plan, in amounts to be determined at trial.

E. Order Defendant to make whole Stephen B. Peters by providing compensation for past and future nonpecuniary losses resulting from the unlawful practices complained of in paragraph seven above, including, but not limited to, emotional pain, suffering, inconvenience, mental anguish, humiliation, loss of enjoyment of life, and other non-pecuniary losses, in amounts to be determined at trial.

F. Order Defendant to pay Stephen B. Peters punitive damages for its malicious and reckless conduct described in paragraph seven above, in amounts to be determined at trial.

G. Grant such further relief as the Court deems necessary and proper in the public interest.

H. Award the Commission its costs of this action.

JURY TRIAL DEMAND

The Commission requests a jury trial on all questions of fact raised by its Complaint.

DATED this 30th day of December, 2002.

Respectfully submitted,

GWENDOLYN YOUNG REAMS
Acting General Counsel

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1801 L Street, NW
Washington, D.C. 20507

/s/
MARY JO O'NEILL
Regional Attorney

/s/
C. EMANUEL SMITH
Supervisory Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Phoenix District Office
3300 N. Central Avenue
Suite 690
Phoenix, Arizona 85012

/s/
VERONICA MOLINA
Trial Attorney

LORETTA MEDINA
Senior Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Albuquerque District Office
505 Marquette NW, Suite 900
Albuquerque, New Mexico 87102
(505) 248-5231

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
AT ALBUQUERQUE

Civ-02-1644

[Filed March 19, 2003]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, d/b/a PHOENIX COCA-COLA BOTTLING COMPANY and COCA-COLA BOTTLING COMPANY OF ALBUQUERQUE, Defendant.	)

ANSWER

Defendant BCI Coca-Cola Bottling Company of Los Angeles ("BCI"), by and through counsel, hereby responds to the allegations of the plaintiff's complaint. BCI denies the plaintiff's description of the "Nature of the Action" as set forth in the complaint, and specifically denies that the charging party, Stephen B. Peters, was subjected to any adverse employment action, including termination, because of his race. In further response to the specific allegations of plaintiff's complaint, BCI states as follows:

JURISDICTION AND VENUE

1.-2. BCI admits that jurisdiction and venue are proper in this court as alleged in paragraphs one and two of the complaint. All remaining allegations in these paragraphs are denied.

PARTIES

3. BCI admits the allegations contained in paragraph three of the complaint.

4. BCI admits the allegations contained in paragraph four of the complaint.

5. BCI admits the allegations contained in paragraph five of the complaint.

STATEMENT OF CLAIMS

6. BCI admits the allegations contained in the first sentence of paragraph six. BCI denies the allegations contained in the second sentence of paragraph six of the complaint.

7. BCI denies the allegations contained in paragraph seven of the complaint, specifically including the allegations contained in subparagraphs (a) and (b) therein.

8. BCI denies the allegations contained in paragraph eight of the complaint.

9. BCI denies the allegations contained in paragraph nine of the complaint.

10. BCI denies the allegations contained in paragraph ten of the complaint.

PRAYER FOR RELIEF

11. BCI denies that the plaintiff or Stephen B. Peters is entitled to any recovery from it under any theory of recovery whatsoever, specifically including the relief sought in paragraphs (A) through (H) of the Prayer for Relief.

JURY TRIAL DEMAND

12. BCI joins the plaintiff in demanding a jury to try this cause of action.

AFFIRMATIVE DEFENSES

13. BCI affirmatively asserts that it did not subject Stephen B. Peters to any adverse employment action because of his race during his employment, and that any such allegation is barred by the applicable statute of limitations.

14. BCI affirmatively asserts that the plaintiffs claims are barred because Stephen B. Peters failed to exhaust his administrative remedies with respect to the non-discharge employment allegations of the complaint.

15. BCI affirmatively asserts that the plaintiff's claims are barred, in whole or in part, by Stephen B. Peters' failure to mitigate damages, if any.

16. BCI affirmatively asserts that the plaintiff's claims are barred, in whole or in part, by the improper and/or unsatisfactory conduct of Stephen B. Peters.

17. BCI affirmatively asserts that the plaintiff's complaint fails to set forth facts sufficient to state a claim upon which relief may be granted.

18. BCI affirmatively asserts that the plaintiff's claims are barred, in whole or in part, by the doctrine of laches, unclean hands, estoppel, and/or waiver.

19. BCI affirmatively asserts that its conduct was not a proximate cause or a cause in fact of Stephen B. Peters' alleged injuries.

20. BCI affirmatively asserts that it never authorized, ratified, or participated in any unlawful conduct involving Stephen B. Peters.

21. BCI affirmatively asserts that, to the extent that the plaintiff is able to prove that any improper motive was a factor in any relevant employment decision made by BCI with respect to Stephen B. Peters, BCI would have made the same employment decisions regarding Stephen B. Peters regardless of any alleged improper motive.

22. BCI affirmatively asserts that, to the extent the plaintiff is able to prove that Stephen B. Peters was subjected to unlawful employment decisions of one or more of BCI's managerial agents, such decision was contrary to BCI's good faith efforts to comply with applicable statutes and regulations, such that the plaintiff is not entitled to punitive damages.

23. BCI affirmatively asserts that neither it nor its attorneys has had the opportunity to fully investigate or participate in discovery and, as such, BCI reserves the right to amend this answer or include in any pretrial order such

further affirmative defenses that may be applicable following completion of its investigation and discovery.

/s/ _____

Christopher M. Moody
MOODY & WARNER, P.C.
4169 Montgomery Boulevard
Albuquerque, New Mexico 87109
505-944-0034
505-944-0033 (fax)

/s/ _____

E. Todd Presnell
Kara E. Shea
MILLER & MARTIN LLP
1200 One Nashville Place
150 Fourth Avenue North
Nashville, Tennessee 37219
615-244-9270
615-256-8197 (fax)
tpresnell@millermartin.com

Attorneys for BCI Coca-Cola Bottling Company of Los Angeles

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ-02-1644
JOB/RHS (ACE)

[Filed February 19, 2004]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, d/b/a PHOENIX COCA-COLA BOTTLING COMPANY and COCA-COLA BOTTLING COMPANY OF ALBUQUERQUE, Defendant.	)

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT[1]

Defendant BCI Coca-Cola Bottling Company of Los Angeles hereby respectfully asks the Court to grant summary judgment in its favor, dismissing all Plaintiff's claims with prejudice, with costs of this action taxed to Plaintiff. As grounds' Defendant submits that Plaintiff cannot establish that Defendant intentionally discriminated against Stephen Peters based on his race. Alternatively, Defendant asks the Court to

[1] Defendant has verified with Plaintiff's counsel that Plaintiff will oppose this Motion.

dismiss Plaintiff's claims for inappropriately broad injunctive relief. In support hereof, Defendant relies upon the Pleadings, the Memorandum of Law filed contemporaneously herewith, as well as the following materials, attached as exhibits hereto: the Declaration of Patricia Edgar, and exhibits thereto (**Exhibit A** hereto); the Declaration of Cesar Grado, and exhibits thereto (**Exhibit B** hereto); the Declaration of Sherry Pedersen, and exhibits thereto (**Exhibit C** hereto); excerpts from the deposition of Geraldine Herrera (**Exhibit D** hereto); excerpts from the deposition of Stephen Peters (**Exhibit E** hereto); excerpts from the deposition of Patricia Edgar (**Exhibit F** hereto); excerpts from the deposition of Sherry Pedersen (**Exhibit G** hereto); excerpts from the deposition of Cesar Grado (**Exhibit H** hereto); and, excerpts from the deposition of Jeff Katt (**Exhibit I** hereto).

/s/ _____

Christopher M. Moody
MOODY & WARNER, P.C.
4169 Montgomery Boulevard
Albuquerque, New Mexico 87109
505-944-0033
505-944-0034 (fax)

E. Todd Presnell
Kara E. Shea
MILLER & MARTIN LLP
1200 One Nashville Place
150 Fourth Avenue North
Nashville, Tennessee 37219
615-244-9270
615-256-8197 (fax)
tpresnell@millermartin.com
Attorneys for BCI Coca-Cola Bottling Company of Los Angeles

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ-02-1644
JOB/RHS (ACE)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, d/b/a PHOENIX COCA-COLA BOTTLING COMPANY and COCA-COLA BOTTLING COMPANY OF ALBUQUERQUE, Defendant.	)

DECLARATION OF PATRICIA K. EDGAR

1. I am Patricia K. Edgar. I am currently employed by BCI Coca-Cola Bottling Company of Los Angeles ("BCI") as Human Resources Manager. In September and October of 2001, I held the position of Employee Relations Manager. At that time I was based in Phoenix, Arizona, but had authority over human resources functions at several BCI facilities in multiple states, including BCI's Albuquerque, New Mexico facility. Sherry Pedersen, who at the time was the Human Resources Administrator at the Albuquerque facility, reported directly to me. I am over 18 years of age and otherwise competent to give testimony in this matter. The statements

contained in this Declaration are based on personal knowledge.

2. The defendant is BCI Coca-Cola Bottling Company of Los Angeles, a Delaware corporation that does business in Albuquerque as The Coca-Cola Bottling Company of Albuquerque. BCI is a wholly owned subsidiary of Coca-Cola Enterprises Inc., which is the world's largest bottler of Coca-Cola® products. Coca-Cola Enterprises Inc. (CCE), and thus BCI, is not The Coca-Cola Company. Rather' CCE is an independent, public company traded on the New York Stock Exchange. It is the largest producer and distributor of products, such as Coca-Cola Classic®, Diet Coke®, and Dasani,® manufactured under a license agreement from The Coca-Cola Company. The Coca-Cola Company does not make Coke. It makes the Coke syrup. CCE, BCI, and other bottlers are the companies that produce and sell the actual finished beverages.

3. As Employee Relations Manager, I had authority to make decisions regarding discipline of BCI employees. The Human Resources personnel working under my supervision also had authority to make decisions regarding discipline and used their discretion in bringing such matters to my attention. However, *all* terminations had to be authorized by me. Occasionally, managers and supervisors would contact me directly regarding non-termination employee discipline issues.

4. On Friday, September 28, 2001, I received a call from Cesar Grado regarding a situation with one of his Merchandisers. Mr. Grado informed me that he just found out from one of his Account Managers that a Merchandiser, Stephen Peters, was probably going to refuse to come in to work on Sunday, September 30, 2001. Mr. Grado told me that this was one of Mr. Peters scheduled days off, but that he

needed Mr. Peters to come in on his day off due to a high-volume work situation. Mr. Grado told me Mr. Peters had previously resisted working on his scheduled days off and that he was anticipating problems in dealing with Mr. Peters on this issue. He asked me if he could require Mr. Peters to come in on his day off.

5. I explained to Mr. Grado that he could require Mr. Peters to come in on his day off. However, I asked Mr. Grado if there was some other way he could resolve the situation. Mr. Grado told me he could not, as one of the other Merchandisers had previously requested to have that Sunday off due to a commitment that could not be changed, and that another Merchandiser had been injured that day and so no one except Mr. Peters was available to come in that weekend. Mr. Grado told me he had checked with other DSMs to see if help was available but was unable to find someone else to work. I then asked Mr. Grado if there was some compelling reason Mr. Peters could not come in to work. Mr. Grado told me he had not spoken with Mr. Peters yet but had heard from one of his Account Managers, Jeff Katt, that Mr. Peters was going to call in sick. I told Mr. Grado that was not acceptable, as an employee cannot call in sick two days in advance of a shift, since he cannot know at that time whether he is actually going to feel well enough to work on the day in question. Under company policy, employees are required to call in sick to their immediate supervisor on the day of the missed shift, within two hours of their scheduled start time.

6. I instructed Mr. Grado to call Mr. Peters and find out what the situation was. I told Mr. Grado that unless Mr. Peters presented some compelling reason why he could not work on the day in question, Mr. Grado should expressly tell Mr. Peters that he was being given a direct order to come to work on Sunday, September 30, 2001 and that failure to

comply with that order was insubordination and would be grounds for termination.

7. Mr. Grado called me again later that day to let me know he had spoken with Mr. Peters. He told me that Stephen Peters had in fact refused to come in to work that weekend. He told me Mr. Peters told him he had plans, but had refused to tell him what the plans were, and at one point told Mr. Grado it was none of his business what his plans were. Mr. Grado told me he carried out my instructions to tell Mr. Peters he was being ordered to come in to work and that refusal to comply with the order was insubordination and could lead to termination. He told me that Mr. Peters responded by saying he understood, and would do what he needed to do, and Mr. Grado could do what he needed to do.

8. Mr. Peters conduct towards Mr. Grado on Friday, September 28, 2001 clearly constituted insubordination, which under BCI policies is a Group A policy sufficient to result in termination on the first offense.

9. Insubordination has a very specific and narrow definition as used by BCI Human Resources Personnel. Insubordination does not mean a situation where an employee has failed to carry out normal job responsibilities or failed to meet performance expectations. Nor is insubordination simply failing or even refusing to follow a supervisor's instructions. Rather, insubordination occurs when the employee knows that he is considered to be defying a direct order of the supervisor and that his conduct could lead to termination.

10. I made the determination on Friday, September 28, 2001, that Mr. Peters was insubordinate. Mr. Peters conduct on Friday, September 28, 2001, standing alone, would have warranted termination. However, I did not make the final

decision to terminate on Friday. By the time I finished my second conversation with Mr. Grado, it was late in the day. I assumed that Mr. Peters, whose regular workday ended around 2 or 3 p.m., had already gone home for the day, and so there was nothing we could do at that point, anyway. I told Mr. Grado we would deal with the situation on Monday.

11. At some point after my second conversation with Mr. Grado—either late Friday afternoon or early Monday morning—I spoke with Sherry Pedersen and learned some additional information about Stephen Peters. It would have been standard practice to pull an employee's personnel file in such a situation, and Ms. Pedersen had done so, either based upon my instruction or on her own initiative. I learned from Mr. Pedersen that Mr. Peters had been written up for insubordination in September 1999, and had been given a final warning at that time that any further incidents of insubordination could lead to termination. The incident from 1999 was very similar to the incident on September 28, 2001, in that Mr. Peters had refused to come in to work on a scheduled day off and had become confrontational with his supervisor. Mr. Grado was not Mr. Peters' supervisor in 1999, and the fact that Mr. Peters had had a similar incident with a different supervisor contributed to my conclusion that Mr. Grado had presented me with an accurate account of events.

12. On Monday, October 1, 2001, I met with Sherry Pedersen by telephone on at least two occasions to discuss the situation regarding Stephen Peters. Mr. Grado was also present at these meetings. I learned from Mr. Grado on Monday morning that Mr. Peters had not showed up to work on Sunday, September 30, 2001, and had made no attempt to contact Mr. Grado. I asked Mr. Grado to check and make sure that Mr. Peters had not tried to page him or leave a

message for him regarding why he was not coming in to work. I later learned from Mr. Grado or Ms. Pedersen that Mr. Peters had called Jeff Katt, an Account Manager, on Saturday night to tell him he was sick and was not coming to work on Sunday. Under BCI policy, employees are required to contact their immediate supervisor when they cannot come to work. Mr. Katt is not Mr. Peters' immediate supervisor, and, in fact, had no supervisory authority over Mr. Peters.

13. By the end of the day Monday, October 1, 2001, I had made a final decision to terminate the employment of Stephen Peters. This decision was based on several factors. First and foremost was the conduct of Mr. Peters towards Mr. Grado on Friday September 28, 2001. There was no question in my mind that Mr. Peters had committed the offense of insubordination that day. A single offense of insubordination is sufficient to warrant termination under BCI policy. However, this was not Mr. Peters' first offense of insubordination. The fact that Mr. Peters had previously been written up for insubordination and had already been given a final warning on this issue also contributed to my decision to terminate his employment. Mr. Peters had already been given more chances than the policy required on this issue, and I felt that any action short of termination at that juncture could set a bad precedent on the issue of BCI's stance with respect to insubordination.

14. The fact that Mr. Peters followed through on his announced intention of defying a direct order and did not come to work on Sunday, September 30, 2001, also contributed, to a lesser extent, to my decision to terminate his employment. Mr. Peters was not terminated for committing a "no call/no show" violation. Any such violation would have been handled under BCI's progressive discipline policy. Rather, I viewed Mr. Peter's failure to come to work on

Sunday not as an isolated attendance issue, but as the fulfillment of his stated intention the previous Friday to defy Mr. Grado's direct order. The fact that Mr. Peters called in sick to Jeff Katt on Saturday night had no impact whatsoever on my assessment of the situation, for several reasons. First, in my opinion, the timing of Mr. Peters' alleged sickness was highly suspect. I knew that he worked his scheduled shifts on Friday September 28, 2001 and Monday, October 1, 2001, which led me to conclude he could have come to work on Sunday if he wished to do so. I also found it particularly suspicious that Mr. Peters chose to call in sick to Mr. Katt, rather than Mr. Grado, given the fact that Mr. Peters had been warned by Mr. Grado the day before that if he did not come to work he would be subject to termination. In my opinion, which I formulated prior to my decision to terminate, if Mr. Peters had genuinely been sick, and unable to work, and was genuinely interested in preserving his employment relationship with BCI, he would have called in to explain the situation directly to Mr. Grado.

15. I was solely responsible for making the decision to terminate Mr. Peters' employment. At no point during my meetings with Mr. Grado did I ask—or did Mr. Grado offer—an opinion or recommendation as to what should be done with Mr. Peters.

16. Mr. Peters was terminated solely for insubordination. Mr. Peters was not terminated for performance issues. Mr. Peters was not terminated for attendance violations. Mr. Peters was not terminated because he called in sick to Mr. Katt instead of Mr. Grado. Mr. Peters was not terminated because he did not show up for work on Sunday, except to the extent this conduct is viewed in context with his exchange with Mr. Grado on Friday, September 28, 2001, as the

fulfillment of Mr. Peters stated intention to defy a direct order from Mr. Grado.

17. On Monday afternoon, I instructed Mr. Grado and Ms. Pedersen to meet with Mr. Peters on Tuesday morning and tell him he was being terminated for insubordination. I did not attend the termination meeting. At some point after the termination meeting, during a telephone conversation with Ms. Pedersen, Ms. Pedersen asked me if I knew that Mr. Peters was African American, because she had not realized that fact until she saw him at the termination meeting. In fact, I did not know until Ms. Pedersen told me, on October 2, 2001, that Mr. Peters was African American, which I stated to Ms. Pedersen.

18. Race played no part whatsoever in my decision to terminate the employment of Stephen Peters. I did not even know he was African American when I made the decision to terminate his employment. Neither Mr. Grado nor Mr. Pedersen informed me that Mr. Peters was African American. I had never previously met Mr. Peters or dealt with him with respect to any human resources issues. In September and October 2001, my area of responsibility included well over one thousand BCI employees.

19. Part of my responsibilities at BCI includes implementation of BCI's Affirmative Action, Diversity, and Equal Employment Opportunity ("EEO") policies. A copy of BCI's Equal Employment Opportunity policy in effect in 2001 is attached hereto as Exhibit 1. All new employees are given a copy of this policy during new employee orientation. The current version of this policy is also prominently posted in all BCI facilities. I conduct training sessions for all management employees on the topics of Affirmative Action and Workplace Diversity at least once a year, and I did so in 2000, 2001, and

2002. During these sessions—which expressly address BCI's EEO policy—management employees are instructed that discrimination based upon any prohibited criteria—including race—in hiring and terms and conditions of employee is both against the law and in violation of BCI policy. Representative materials from these training sessions are attached hereto as Collective Exhibit 2. These training sessions are mandatory for all members of management.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd day of February, 2004.

/s/ _____
PATRICIA K. EDGAR

EXHIBIT A-1

Coca-Cola Enterprises Inc.

To: All Corporate Employees

From: Lowry F. Kline /s/
Chairman and Chief Executive Operator

Subject: EQUAL EMPLOYMENT
OPPORTUNITY POLICY

Coca-Cola Enterprises continues to be an Equal Opportunity Employer. An ongoing commitment to Affirmative Action is an important part of our Corporate universe, and the creation of a workplace totally free of discrimination and harassment is a major goal.

Coca-Cola Enterprises Inc. observes measures to assure that the Company adheres to all applicable federal, state and local laws and regulations regarding the entire area of Equal Opportunity. The Company fully endorses this commitment, and will recruit, hire, train and promote individuals in all job titles without regard to race, color, creed, religion, ancestry, national origin, age, sex, sexual orientation, physical or mental disability, being a disabled veteran, veteran of the Vietnam Era or other eligible veterans.

All Supervisors and Managers are expected to actively enforce the Company's policy of Equal Opportunity, Affirmative Action and Non-Discrimination. Additionally, they are responsible for the prevention and immediate correction of any acts of harassment within their assigned areas of Supervision/Management. All employees are likewise obligated to avoid such behavior and to report incidents of

harassment or discrimination to responsible managers without delay.

Every employee has a responsibility to contribute to a positive work atmosphere, which reflects our non-discrimination policies. I have designated Dan Bowling, Senior Vice President, Human Resources, general responsibility for Affirmative Action Programs and Equal Opportunity Policies, and he will be assisted by Bernard Kunerth, Vice President Human Resources Processes. If you have any questions, please contact the appropriate Manager within your department or the Human Resources Manager. The Vice President HR Processes may be reached at (770) 989-3658.

Revised May 2002

EXHIBIT A-2

What is Discrimination?

Different treatment based on race, sex, religion, disability, age, etc.

- Intentional
- Intent may be shown by statements
- Intent may be shown by unexplained inconsistency

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ-02-1644
JOB/RHS (ACE)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, d/b/a PHOENIX COCA-COLA BOTTLING COMPANY and COCA-COLA BOTTLING COMPANY OF ALBUQUERQUE, Defendant.	)

DECLARATION OF CESAR GRADO

1. I am Cesar Grado. I am employed by BCI Coca-Cola Bottling Company of Los Angeles ("BCI") as a District Sales Manager ("DSM") at the BCI facility located in Albuquerque, New Mexico, the same job position I held in September and October 2001. I am over 18 years of age and otherwise competent to provide testimony. The statements in this Declaration are based on personal knowledge.

2. My duties as DSM in 2001 included direct supervision of two Account Service Representatives (sometimes known as "Account Managers") and six Merchandisers. These are two

different job positions. Account Managers are salaried salespersons responsible for selling Coca Cola® products in the accounts—typically grocery stores and other retail outlets—in their area of responsibility. Merchandiser job duties include placement and rotation of product, cleaning and arrangement of display areas, and placement of promotional materials in accounts. I handle all scheduling and route assignments for Merchandisers working under my supervision.

3. Merchandisers generally work five days each week with two off days. Since the stores on each route have to be covered regardless of the day of the week, none of the Merchandisers working under my supervision will have the same two days off. Some of the Merchandisers working for me are assigned regular routes, and some work as "floaters," filling in for other Merchandisers on their scheduled days off and during absences.

4. All Merchandisers working under my supervision are sometimes required to work on their scheduled days off, in order to provide extra coverage for routes during particularly busy times and/or when other employees are absent. An example of a busy time would be when one or more accounts is running an "ad"—that is, offering special prices on Coca Cola® products which results in increased volume of sales and thus necessitates more frequent deliveries. When I need extra help covering routes, I first request volunteers. If I cannot obtain sufficient coverage in this manner, I will ask Merchandisers to come in on their days off, on a rotating basis.

5. At the time of his termination, Stephen Peters was the most senior Merchandiser working under my supervision. Because of his seniority, Mr. Peters had Saturday and Sunday

as his scheduled days off. Mr. Peters made it known to me that he did not like to work on his days off. However, to be fair to the other Merchandisers, I did sometimes ask Mr. Peters to work on his scheduled days off, on a rotating basis. During 2001 up until his termination, Mr. Peters worked on his days off on 8 occasions, including three Sundays and five Saturdays. During the same 34-week period, Merchandiser Frank Ortiz, who is Hispanic, worked on his scheduled days off 12 times, Merchandiser Donald Conner, who is white, worked on his scheduled days off 10 times, Merchandiser Arturo Lopez, who is Hispanic, worked on his scheduled days off 9 times, while a later hire, Merchandiser Robert Espinosa, who is Hispanic, worked on his scheduled days off on 7 times in only 21 weeks.

6. As a DSM, I am responsible for monitoring and evaluating the employees working under my supervision. When an employee has an attendance, performance, and/or disciplinary issue, I bring facts relating to the matter to the attention of our Human Resources Department. The Human Resources representative then makes the decision about which company policy or policies applies to the situation, if any, and the appropriate action to take based upon what has occurred. I do not have independent authority to discipline or terminate employees working under my supervision. All such disciplinary actions must be authorized by our Human Resources Department. It is my responsibility to deliver or communicate all disciplinary actions—whether verbal or written—to employees working under my supervision.

7. Three of the chain stores in my area were running ads over the weekend of Saturday, September 29 and Sunday, September 30, 2001. Thus, I was facing a high-volume work situation that weekend, and I determined that I needed to bring in an extra Merchandiser to work that weekend One of

the Merchandisers who had a scheduled day off on Sunday, September 30, 2001, Joseph Rivera, had previously told me that he had a commitment which prevented him from coming in on his day off. It is my recollection that I therefore asked one of my Account Managers, Jeff Katt, to relay a message to Stephen Peters that I needed him to work on one of his days off that weekend, either Saturday or Sunday, and it was my understanding based upon my communications with Mr. Katt that Mr. Peters agreed to work on Sunday, September 30, 2001. On Friday, September 28, 2001, I found out that one of my "floater" Merchandisers, Damian Mirabal, had suffered an on-the-job injury and would be out of work for a week. The doctor's note which we received from Mr. Mirabal is attached hereto as Exhibit 1. Mr. Mirabal typically covered Mr. Peters' routes on Mr. Peters' days off. Also on Friday, September 28, 2001, I learned from Mr. Katt that Mr. Peters was not going to work on Sunday, September 30, 2001. Mr. Katt told me that he believed Mr. Peters was not going to work on Sunday and might call in sick. However, Mr. Peters had worked all his scheduled days that week and had not been out sick. In any event, as of the middle of the work day Friday, September 28, 2001, I understood that Mr. Mirabal was out due to an injury, and that Mr. Peters was not agreeing to come to work Sunday September 30, and so not only was I not going to have the extra coverage I wanted for that weekend, but, with Mr. Mirabal's absence, I was actually going to be a person short. The remaining Merchandisers were already scheduled to work that weekend, except for Mr. Rivera, who was unavailable, and so I had no one left to bring in but Mr. Peters. The schedule showing hours worked by Merchandisers that week is attached as Exhibit 2 hereto. I did check with other District Sales Managers to see if they had anyone available to help me, but they did not.

8. I understood around mid-day on Friday, September 28, 2001, that I would need to order Mr. Peters to come in to work that weekend. I decided to contact the Human Resources Department for advice on how to handle the situation. Ordinarily, I would have spoken with Sherry Pedersen, but she was out of the office, and so I called Pat Edgar in Phoenix. I explained the situation to Ms. Edgar. She asked me if I had looked into every other way of getting the routes covered, and I said I had. She told me I could require Mr. Peters to come in to work. She told me that if I encountered resistance I needed to explain to Mr. Peters very clearly that he was being given a direct order and that failure to comply with the order would be insubordination and could lead to termination.

9. After I got off the phone with Ms. Edgar, I paged Mr. Peters. Mr. Peters called me back immediately. I told Mr. Peters I needed him to work that weekend. Mr. Peters said he could not work because he had plans. I asked Mr. Peters what his plans were, in an effort to determine whether he was able to work one of the weekend days. I offered to let him work Saturday rather than Sunday. Mr. Peters told me that his plans were none of his business, and again refused to come in to work at all that weekend. Mr. Peters raised his voice during this exchange. At that point I told Mr. Peters that his refusal to work as ordered was insubordination, and could lead to termination. Mr. Peters told me to do what I have to do, and he would do what he had to do. The conversation then ended as we both hung up.

10. After I spoke with Mr. Peters, I called Pat Edgar back and told her what had happened. At that point it was late afternoon Friday. Ms. Edgar told me we would deal with the situation on Monday. I believe I also spoke to Ms. Pedersen

about the situation on Friday afternoon, although it may not have been until Monday morning.

11. Based Mr. Peters' comments to me during our telephone conversation on Friday, September 28, 2001, I had no expectation that he would be at work on Sunday, September 30, 2001. Thus, I spoke with Jeff Katt on Friday afternoon and made the necessary arrangements to cover all the routes for Sunday. There were no other Merchandisers available to come in, and so I just split the accounts which needed coverage between myself and Mr. Katt.

12. Mr. Peters did not come to work on Sunday, September 30, 2001. He made no attempt to contact me over the weekend. Mr. Peters reported for work as scheduled on Monday morning, October 1, 2001.

13. On Monday, October 1, 2001, I met with Sherry Pedersen and Pat Edgar at least twice to discuss the situation with Mr. Peters. Ms. Edgar attended the meetings by phone. During these conversations, I simply reported the facts to Ms. Edgar and gave no opinion or recommendation as to what I thought should happen to Mr. Peters. At some point during one of these conversations, Ms. Edgar asked me to check to make sure Mr. Peters had not made any attempt to contact me over the weekend. I did check and while I confirmed that Mr. Peters had made no attempt to contact me, I learned for the first time that he had called in sick to Jeff Katt on Saturday night. I relayed this information to Ms. Pedersen and Ms. Edgar on Monday. At some point on Monday Ms. Edgar informed me that it had been determined that Mr. Peters had committed insubordination and would be terminated. I was instructed to bring Mr. Peters to Sherry Pedersen's office the first thing Tuesday morning, October 2, 2001.

14. I asked Mr. Peters to meet me in Sherry Pedersen's office on Tuesday morning. At that point, I delivered the termination paperwork to Mr. Peters and told him he was being terminated for insubordination. The paperwork which was delivered to Mr. Peters is attached hereto as Exhibit 3.

15. During my discussions with Pat Edgar and Sherry Pedersen leading up to Mr. Peters termination, I never mentioned to either one of them that Mr. Peters is African American. The subject of Mr. Peters' race never came up in any of my discussions with Ms. Pedersen and/or Ms. Edgar, or in any of the conversations which I witnessed between Ms. Pedersen and Ms. Edgar prior to Mr. Peters' termination.

16. I have no racial animosity towards African Americans generally, or towards Stephen Peters specifically. I have been trained by BCI regarding diversity and discrimination issues, and I know that under BCI policy and under law, race may not play a part in any decision which adversely effects an employee. Mr. Peters' race had nothing whatsoever to do with how I handled this situation.

17. I have supervised employees who had performance and/or attendance problems, and I have brought these issues to the attention of the BCI Human Resources Department. For instance, both Arturo Lopez and Damian Mirabal, Merchandisers working under my supervision, were written up under BCI's progressive discipline policy. Both Mr. Lopez and Mr. Mirabal had problems with attendance and work quality. As with all employees working under my supervision, I brought the problems regarding these individuals to the attention of Human Resources, and Ms. Pedersen and/or Ms. Edgar made the decision on how to handle these situations. Mr. Mirabal never refused a direct order from me and was never told that his conduct was insubordination.

18. Other than Mr. Peters, I have never had a situation where an employee refused a direct order, and, after being told his conduct was insubordinate and that he could be fired, told me to "do what I have to do."

19. On one occasion after Mr. Peters was terminated, Mr. Katt reported to me that Mr. Lopez had refused to return a page and had displayed a negative attitude about being paged. I then paged Mr. Lopez and he also failed to return my page. At that point, I entered a text message to Mr. Lopez. I don't remember the exact wording of my message to Mr. Lopez, but it was to the effect of telling him that if he refused to return my page he could be terminated. This incident occurred on November 20, 2001, several weeks after the incident with Stephen Peters, and so I remembered the previous instructions from Pat Edgar on how to clearly state a direct order to an employee and let the employee know he could be fired for his conduct, which is why I sent this text message to Mr. Lopez. Mr. Lopez never did return my page or call me that day. As a matter of fact, that was Mr. Lopez's last day working at BCI. He simply never returned to work and after he failed to show up for three days his employment was deemed to be terminated due to job abandonment. I informed Ms. Pedersen that Mr. Lopez was not coming in to work, and she instructed me how to document his termination. I never told Ms. Pedersen about Mr. Lopez's failure to return my page, since, at that point, because he had apparently quit, it really did not seem to matter. However, if Mr. Lopez had continued as an employee of BCI, I would definitely have brought his conduct to the attention of the Human Resources Department, just as I did with Stephen Peters.

20. Monica Lovato was a Merchandiser working under my supervision. Ms. Lovato did not have any performance issues

when she worked under my supervision. Ms. Lovato never refused a direct order from me to come to work, and I never told Ms. Lovato that her conduct could be considered insubordination and could lead to termination.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 3 day of February, 2004.

/s/_____
CESAR GRADO

EXHIBIT B-2

This report shows cost compared to sales volume. It also show merchandisers hours by day. Keep in mind we need 6 merchandisers a day to cover routes.

Cost Per Case Recap
DSM CESAR GRADO
Week Ending 9-30-01

Cases Per Hour	45.61
Weekly Cases	17468
CPC	0.234

Merchandiser Name	**Mon.**	**Tues.**	**Wed.**	**Thurs.**
Russell Kroger	0.00	0.00	8.50	10.15
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	10.93	9.15	7.67	46.40
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	40	6.4		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	0		0
	Hrly Rt	**Pay**		
	9.25	458.80		

Merchandiser Name	**Mon.**	**Tues.**	**Wed.**	**Thurs.**
Stephen Peters	8.68	10.13	8.45	10.57
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	11.23	0.00	0.00	49.06
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	40	9.06		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	0		0
	Hrly Rt	**Pay**		
	10.50	562.695		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
Barry Lafaver	2.02	11.50	8.52	12.13
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	12.96	10.00	10.63	67.68
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	40	27.78		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	0		0
	Hrly Rt	**Pay**		
	9	735.03		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
Damian Mirabel	7.40	0.00	0.00	12.05
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	1.35	0.00	0.00	20.80
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	20.8	0		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	0		0
	Hrly Rt	**Pay**		
	9.25	192.40		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
Carlos Barrera	10.05	10.13	10.75	0.00
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	0.00	10.40	9.28	50.61
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	40	10.61		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	0		0
	Hrly Rt	**Pay**		
	9.25	517.214		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
Arturo Lopez, Jr.	11.43	12.98	0.00	0.00
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	10.60	9.53	8.52	53.06
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	40	13.06		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	0		0
	Hrly Rt	**Pay**		
	9	536.31		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
Robert Espinosa	9.07	9.13	10.95	0.00
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	0.00	15.24	0.00	44.39
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	40	4.39		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	0		0
	Hrly Rt	**Pay**		
	9	419.265		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
Joseph Rivera	7.48	0.00	10.09	12.12
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	11.13	9.25	0.00	50.88
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	40	10.88		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	0		0
	Hrly Rt	**Pay**		
	9	506.88		

Hours Cost	**Ttl Hr**	**Reg Hrs**	**OT Hrs**
	383	300.8	0
	Vac Hrs	**Sck Hrs**	**Hol Hrs**
	0	0	0
	Lt Duty	**Hrly Rt**	**Pay**
	0	0	3928.59
Mileage Cost			162.15
			4090.74

This scheduled week shows hours by day by Merchandiser.

• Russell Kroger had already taken his normal days off prior to weekend. (regular workday)

• Barry Lafaver came in every day of the week to help our needs in help.

• Damian Maribel took his days off, and got hurt on Friday 9-28-01. This was one of the routes we needed to cover over the weekend. (regular workday - offwork status)

• Carlos Barrera took his normal days off and was scheduled for the weekend. (regular workday)

• Arturo Lopex took his days off and was scheduled to work the weekend. (regular workday)

• Robert Espinosa took his normal days off. Worked late night on Saturday to cover his Sunday Route. regular day

• Joseph Rivera normal days off are Sunday & Monday.

EXHIBIT B-3

DISCIPLINARY STATUS NOTICE

EMPLOYEE NAME: Stephen Peters
Date: 10/02/2001
DEPARTMENT: Sales
SUPERVISOR: Cesar Grado
JOB TITLE: Merchandisers
DATE HIRED: 05/03/1995
VIOLATION DATE: 09/30/2001

DETAILS OF VIOLATION: List issues of violation. Refer to specific provisions of Company policy, if applicable. Explain as completely as possible - include dates, times, persons involved, etc.

Group A: Insubordination: On Friday 9-28-01 you were given a direct order to come in to work on Sunday 9-30-01 due to business necessity. I also explained how this was a direct order and failure to comply with the directive would be considered insubordination and would result in termination. You explained how you had plans and that I "should do whatever I had to do". You did not report to work on Sunday 9-30-01, therefore your employment is being terminated for insubordination.

PREVIOUS WARNING(S) TO EMPLOYEE: Yes__X__

If "Yes" - Type & When: 09/21/1999 Insubordination

IMMEDIATE IMPROVEMENT MUST BE MADE & MAINTAINED OR FURTHER DISCIPLINARY ACTION, UP TO AND INCLUDING TERMINATION, WILL BE TAKEN

EMPLOYEE STATEMENT: I DO NOT AGREE

EMPLOYEE SIGNATURE: /s/_____DATE: 10/2/01

SUPERVISOR SIGNATURE:/s/_____DATE: 10/2/01

WITNESS SIGNATURE: /s/_____DATE: 10/2/01

WITNESS SIGNATURE: /s/_____DATE: 10/2/01

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ-02-1644
JOB/RHS (ACE)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, d/b/a PHOENIX COCA-COLA BOTTLING COMPANY and COCA-COLA BOTTLING COMPANY OF ALBUQUERQUE, Defendant.	)

DECLARATION OF SHERRY PEDERSEN

1. I am Sherry Pedersen. I am currently employed by BCI Coca-Cola Bottling Company of Los Angeles ("BCI") in the position of Employee Relations Manager. In September and October of 2001, I held the position of Senior Human Resources Administrator. At that time, I was the top-ranking Human Resources representative at BCI's Albuquerque, New Mexico facility. I reported to Patricia ("Pat") Edgar, who was at that time an Employee Relations Manager based in Phoenix. I am over the age of 18 and otherwise competent to provide this declaration. The statements contained in this Declaration are based on personal knowledge.

2. In my role as Senior Human Resources Administrator, I authorized all disciplinary actions taken with respect to employees at the Albuquerque facility. Managers and supervisors brought issues to my attention regarding employee conduct, performance, and attendance. I would then decide whether any additional factual investigation was necessary. If I decided additional investigation was necessary, I would instruct the manager or supervisor to conduct such investigation or conduct the investigation myself, as appropriate. When I felt I had all the facts I needed to assess the situation, I would decide which BCI policy or policies applied to the particular situation, if any, and what disciplinary action, if any, would be taken. All terminations had to be authorized by Pat Edgar; I sometimes consulted with Ms. Edgar on non-termination situations as well.

3. In addressing employee disciplinary issue, BCI Human Resources personnel consult written policies setting for workplace rules and regulations. As set forth in Exhibit 1 hereto, these rules and regulations are divided into three categories according to the severity of the infraction. Group A violations address the most serious workplace issues, such as insubordination. Group A violations will be sufficient to result in immediate discharge, although this is not a mandatory result. Group B and C violations, on the other hand, are generally dealt with in a progressive manner, depending on the nature of the infraction. Group C also encompasses attendance violations. Portions of BCI's attendance policy are set forth in Exhibit 2 hereto. No call/no show violations are handled under a separate policy as set forth in Exhibit 3, and are also subject to progressive discipline. In addressing disciplinary issues, Human Resources personnel retain discretion in interpreting and applying these policies, as each situation is unique and must be assessed on an individualized basis.

4. For some reason that I cannot now recall, I was unavailable for the first part of the day on Friday September 28, 2001, and so I did not know there was an issue with Mr. Peters until after Mr. Grado had already spoken with Pat Edgar about the situation. I learned what was going on either late Friday afternoon or early Monday morning. I do not remember whether I first learned of the situation from Mr. Grado or Ms. Edgar.

5. Either Friday afternoon or Monday morning, I pulled Mr. Peters' personnel file and found a similar incident in the file which had occurred in September 1999. The documents in the file showed that Mr. Peters had been written up by a previous supervisor for insubordination when he refused to work on a weekend, and became verbally confrontational with his supervisor on a customer's premises. This incident occurred before I came to work at BCI. The documents relating to this incident, attached hereto as Exhibit 4, show that Mr. Peters was specifically warned at that time that further such conduct could result in termination. I relayed this information to Pat Edgar.

6. I met with Cesar Grado and Pat Edgar by phone on Monday, October 1, 2001, to discuss the situation regarding Mr. Peters. Mr. Grado informed us at that time that Mr. Peters had not come in to work on Sunday and had not attempted to contact him. Mr. Grado later told me that Mr. Peters had called in sick to Jeff Katt, which I relayed to Ms. Edgar.

7. On Monday afternoon, Ms. Edgar told Mr. Grado and myself she had decided that Mr. Peters would be terminated for insubordination. Acting upon Ms. Edgar's instruction, Mr. Grado delivered the termination paperwork to Mr. Peters

in my office first thing in the morning on Tuesday, October 2, 2001.

8. During his employment at BCI Mr. Peters never brought any complaints of race discrimination to the attention of the Human Resources Department.

9. I have no recollection of ever having met Stephen Peters prior to October 2, 2001. At any given time around 200 individuals are employed at BCI's Albuquerque facility, and I have very little one-on-one contact with many of these individuals, absent a complaint, disciplinary issue, or other situation which would bring them to my attention. In addition, Merchandisers spend most of their time out in the field servicing accounts, and are rarely seen at the facility's administrative offices, where I work.

10. Until the moment Mr. Peters walked into my office for the termination meeting on October 2, 2001, I did not know he was African American.

11. The only other employee to be terminated for insubordination which I have been involved in during my employment at BCI was Brian Esquibel, a Hispanic male. Mr. Esquibel was not a Merchandiser, and did not report to Cesar Grado at the time of his termination. Mr. Esquibel refused a supervisor's direct order to take out a load of product, telling the supervisor to "go ahead and fire me." Documents relating to Mr. Esquibel's termination are attached hereto as Exhibit 5. From the facts presented to me I determined that Mr. Esquibel's conduct met the definition of insubordination since he knew his refusal of an order could lead to termination, as demonstrated by the fact he expressly stated "go ahead and fire me." Based on my investigation, I recommended to Ms.

Edgar that Mr. Esquibel should be terminated, and Ms. Edgar authorized the termination.

12. Arturo Lopez, a Hispanic male, was a Merchandiser Working under the supervision of Cesar Grado. Mr. Lopez had Group C attendance and work performance issues and received progressive discipline to address these issues. To my knowledge, Mr. Lopez never refused a direct order and was never insubordinate. Mr. Lopez ultimately failed to report to work for three consecutive days and was deemed to have voluntarily terminated his employment. I made all decisions with respect to discipline issued to Mr. Lopez, consulting with Pat Edgar on the final termination decision.

13. Damian Mirabal, a Hispanic male, was a Merchandiser working under the supervision of Cesar Grado. Mr. Mirabal had Group C attendance and work performance issues and received progressive discipline to address these issues. To my knowledge, Mr. Mirabal never refused a direct order and was never insubordinate. Mr. Mirabal was suspended, placed on probation, and ultimately terminated for unsatisfactory performance. I made all decisions with respect to discipline issued to Mr. Mirabal in 2000 and 2001, consulting with Pat Edgar on the final termination decision.

14. Monica Lovato, a Hispanic female Merchandiser who reported to Cesar Grado, was never issue any disciplinary actions during her employment with BCI. Ms. Lovato voluntarily terminated her employment with BCI in 2002.

15. Kelly Sage, a white male, was not a Merchandiser and did not report to Cesar Grado. In November 2000, Mr. Sage's supervisor brought to my attention that Mr. Sage failed to follow his supervisor's order to reload his truck and take

out a delivery, and left the premises without his supervisor's permission. In my assessment, Mr. Sage's conduct in that instance, while a violation of company policy, did not constitute insubordination as I was not presented with any evidence that he was told or was aware that his conduct was insubordination and could lead to termination. Therefore, I made a decision to issue Mr. Sage a written warning for Group B violation, suspend him without pay for three days and warn him that future such conduct could result in termination.

16. Other than the present lawsuit, Mr. Grado ever been the subject of a race discrimination complaint during his employment at BCI.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 3 day of February, 2004.

/s/_____
SHERRY PEDERSEN

EXHIBIT C1

EMPLOYEE RULES AND REGULATIONS

The following rules and regulations are divided into three groupings according to the severity of the infraction(s).

Group A violations will be sufficient to result in immediate discharge, without prior warning.

Group B violations will be dealt with in a progressive manner. For the first violation of any Group B rule, the employee will generally be suspended. The next violation of any Group B rule will be sufficient to result in discharge.

Group C violations will also be dealt with in a progressive manner. The first violation of any Group C rule will generally result in a warning (either verbal or written, depending on the severity or other factors). A second violation of any Group C rule will result in either a written warning or suspension. Once an employee has been suspended for violation of any Group C rule, the next step may be discharge for violation of any Group C rule.

These work rules do not cover every conceivable matter. Therefore, if something happens that is not precisely covered by these rules, the Company reserves the right to treat each case on its own merits and to enhance or diminish the discipline according to the severity of the situation as deemed appropriate. The Company reserves the right to add delete and revise the Employee Rules and Regulations as outlined above.

KEY: VW = Verbal Warning
W = Written Warning
S = Suspension
D = Discharge

NOTE: Where W/S, S/D, etc. is indicated, the penalty for the rule infraction may vary, depending upon the severity of the offense.

Group A	**Offense**			
	1st	2nd	3rd	4th
1. Falsification of employment application, work hour records, or other Company records.	D			
2. Making claims of illness or occupational injury or disability in bad faith or knowing them to be false.	D			
3. Theft, fraud, embezzlement, or unauthorized removal of Company, customer, or fellow employee property or funds.	D			
4. Destruction or abuse of Company property or that of fellow employees or customers.	D			
5. Insubordination	D			

Group A	Offense 1st	2nd	3rd	4th
6. Possession, sales, use or being under the influence of alcohol or drugs during work hours (including breaks and lunch), on/in Company property, or in Company uniform.	D			
7. Refusal to submit to a blood, urine or other medical test to detect drugs or alcohol.	D			
8. Possession of firearms or other weapons on/in Company property.	D			
9. Provoking, fighting or committing any act of violence against any person during working hours or on/in Company property, or as a result of the employment relationship.	D			
10. Absence of three (3) consecutive working days without notifying the Company.	D			
11. Harassment of another employee due to that employee's race, sex, religion, national origin, age, handicap or disability, or veteran status, including sexual harassment.	D			

Group B	Offense 1st	2nd	3rd	4th
12. Failure to immediately report a vehicular accident as provided by Company policy.	D			
13. Punching another employee's timecard.	D			

Group B	Offense 1st	2nd	3rd	4th
1. Misconduct which casts discredit upon Company reputation or image while on Company time, in Company uniform or in/on Company property.	W/S	S/D	D	
2. Use of threatening, abusive or profane language towards supervision, customers, or employees.	W/S	S/D	D	
3. Horseplay.	W/S	S/D	D	
4. Sleeping on the job.	S/D	D		
5. Delaying or restricting operations or influencing others to do so.	S	D		

Group B	Offense 1st	2nd	3rd	4th
6. Failure to inform supervision of the use of prescriptions or over-the-counter medications that could impair ability to perform assigned duties.	S	D		
7. Failure to report an on-the-job injury per Company policy.	W/S	S/D	D	
8. Leaving job assignment without notifying supervision.	S	D		
9. Intimidating, threatening, coercing or interfering with a supervisor or other employee.	S	D		
10. Unauthorized use of Company vehicle or permitting unauthorized passengers to ride in Company vehicles.	S/D	D		
11. Removal of product from warehouse stock, delivery vehicles or customer stock for personal consumption.	W/S	S/D	D	

Group C	Offense 1st	2nd	3rd	4th
1. Failure to satisfactorily carry out normal assigned duties.	VW/W	W/S	S/D	D
2. Careless and/or recurrent errors.	VW	W	S	D
3. Failure to observe assigned work schedule, including start and stop time of breaks and lunch.	VW	W	S	D
4. Failure to comply with attendance policy.	VW	W	S	D
5. Failure to observe safety rules or common safety practices.	VW	W	S	D
6. Neglect of duty while on Company time. Engaging in activities other than assigned work, such as loitering, unauthorized absences from work station, excessive visiting with other employees.	VW	W	S	D
7. Solicitation of funds or sale of articles for any cause during Company time whether in work areas or non-work areas.	W		S	D
8. Excessive on-the-job injuries to include reinjury following medical release.	VW	W	S	D

Group C	Offense			
	1st	2nd	3rd	4th
9. Preventable vehicular accidents in accordance with Policy guidelines.	W	S	D	
10. Distribution of written materials during work time or in work areas. Posting notices or other written materials on Company bulletin boards or within the workplace.	W	S	D	
11. Unauthorized personal use of Company phones' equipment or facilities.	W	S	D	
12. Smoking in restricted areas.	W	S	D	
13. Violation of dress code.	VW	W	S	D
14. Littering or poor housekeeping including Company vehicles.	VW	W	S	D
15. Failure to provide the Company with current address, home phone number and emergency contact.	VW	W	S	D

EXHIBIT C-2

PHOENIX DIVISION COCA-COLA ATTENDANCE POLICY

Policy

It is expected that employees will report to work each day they are scheduled and ready to begin work at their assigned times, unless they are too incapacitated by illness, injury, or overwhelming, compelling personal circumstances. However, when absences or tardies are unavoidable, the following shall be required:

Absences

1. Employees who are going to be absent, must call in to their immediate supervisor, or his/her designee, at least one-half hour prior to his/her regular starting time. Failure to call or notify their supervisor may result in immediate disciplinary action.

2. Supervisors will inquire as to the general reason for the absence or tardy.

3. Employees are expected to call in at the beginning of each day of an absence, per #1 above, unless other arrangements are made with their supervisor, such as an extended absence or leave of absence. Failure to call or notify their supervisor may result in immediate disciplinary action.

4. If absence is the result of an occupational injury or illness where modified duty has been assigned, it is expected that employees will let their supervisor know where they can be reached while absent.

5. Upon return from an absence, an employee must report his or her return directly to their immediate supervisor.

6. Supervisors will document or log all callins and other reports, noting time, date and reason for call or report.

7. Supervisors may require written doctor's statements attesting to the ability of the employee to return to their regular work duties without unnecessary risks and/or to verify illness or injury. Supervisors also reserve the right to determine whether or not personal circumstances are so overwhelming or compelling, as to require absence from work.

The Company endorses a no-fault attendance policy. Absenteeism for <u>any</u> reason, excused or not, except for jury duty, bereavement, on-the-job injury or vacations, which is in excess of ten regularly scheduled days in a 12-month period, (consisting of at least three separate incidents in the same 12-month period – note: a three-day absence for flu is recorded as one incident), shall be grounds for progressive disciplinary action, which may culminate in discharge if sustained improvement in attendance is not immediately forthcoming. Similarly, if there are more than five incidents of absenteeism in a 12-month period regardless of number of days

EXHIBIT C-3

Memorandum please post

To: All Employees, Desert Sun Division
From: Human Resources
Date: 10/21/99
Re: NO CALL NO SHOW

As you are aware, no call no show by an employee is a serious violation of company guidelines and is costly to our organization. It places a hardship on customers, co-workers, and supervisors to cover another's work responsibilities after the fact without any benefit of communication.

Everyone knows that 3-days consecutive no call no show will result in termination of employment. However, we want to make it very clear that non-consecutive no call no show events are handled according to the following progressive steps:

1 day	Written Warning
2 days	Suspension
3 days	Termination

Employees are determined as no call no show if they fail to call in and fail to arrive at work within a reasonable timeframe to enable them to perform their scheduled work. This will be determined by management. All other circumstances will be according to the attendance policy.

EXHIBIT C-4

DISCIPLINARY STATUS NOTICE

EMPLOYEE NAME: Stephen Peters
Date: 9/17/99
DEPARTMENT: Sales - Home Market
SUPERVISOR: Eddie Esquivel
JOB TITLE: Bulk Merchandiser
VIOLATION DATE: 9/17/1999
TIME: 11:50am
PLACE: Albertson's

NATURE OF VIOLATION: Policy/Procedures, Misconduct

DETAILS OF VIOLATION: List issues of violation. Refer to specific provisions of Company policy, if applicable. Explain as completely as possible - include dates, times, persons involved, etc.

At 10:00 AM, Friday, Sept. 17, Bill Donnelly received a phone call from Eddie E stating that Stephen Peters refused to work Saturday or Sunday of this weekend. Eddie stated Stephen was rude and unprofessional in his conduct and hung-up the phone on Eddie before Eddie was done talking at 11:40 am, Bill Donnelly met with Stephen at the Albertson's on Juan Tabo and Lomas. Stephen was visibly upset at this meeting with Bill; he paces from one side of Bill to the other and spoke a raised voice throughout the consecration. Three times during the conversation, Stephen said he was going to have Bill & Eddie's job. Stephen Peters was immediately removed from further duty and sent home. Mr. Peters is reminded of the following:

1) All Coca-Cola employees must follow company procedures and follow direct orders from their supervisors. Failure to comply is considered a direct act of insubordination.

2) At no time will threats to supervisors & managers' positions with CCE be tolerated. This is also considered a direct act of insubordination is subject to disciplinary action up to and including termination.

Any further instances of insubordination can result in termination. FINAL WARNING.

Disciplinary Suspension (without pay) of 2 day(s) from 9/20 to 9/21. Return to Work on 9/22/99.

IMMEDIATE IMPROVEMENT MUST BE MADE & MAINTAINED OR FURTHER DISCIPLINARY ACTION, UP TO AND INCLUDING TERMINATION, WILL BE TAKEN

EMPLOYEE SIGNATURE: Refused to Sign DATE:

SUPERVISOR SIGNATURE:/s/_____ DATE: 9/21/99

HR APPROVAL: /s/_____ DATE: 9/20/99

EXHIBIT C-5

EMPLOYEE NAME: Bryan Esquibel
Date: 04/25/2002
DEPARTMENT: Distribution
SUPERVISOR: Rick Gallegos
JOB TITLE: Driver
DATE HIRED: 03/03/1998
VIOLATION DATE: 04/23/2002
NATURE OF VIOLATION: Rules/Regulations

DETAILS OF VIOLATION: List issues of violation. Refer to specific provisions of Company policy, if applicable. Explain as completely as possible - include dates, times, persons involved, etc.

Group A-#5-Insubordination. On 4/23/02, you were given a directive by your supervisor, Rick Gallegos, to take out a hot shot delivery. By your own admission, you told Rick you would not take out the hot shot. Rick told you again to take out the hot shot and you again refused. You walked away from Rick and said 'go ahead and fire me'. You are aware of the process for determining who takes out the hot shot orders. You were the second driver in, therefore, you were required to take out the hot shot. You were asked by Sherry Pedersen on 4/24/02 to give a written statement, so that your information regarding this incident could be taken into consideration during the suspension pending. You were led to the hospitality room to write your statement, however, it was discovered a few minutes later that you had left the facility without writing a statement or notifying supervision that you were leaving. Therefore, based on the information provided your employment is being terminated for insubordination.

ACTION TAKEN: Discharge

PREVIOUS WARNING(S) TO EMPLOYEE: No X

IMMEDIATE IMPROVEMENT MUST BE MADE & MAINTAINED OR FURTHER DISCIPLINARY ACTION, UP TO AND INCLUDING TERMINATION, WILL BE TAKEN

EMPLOYEE SIGNATURE: Refused to Sign **DATE:**

SUPERVISOR SIGNATURE: /s/ _____ **DATE:** 4/25/02

WITNESS SIGNATURE: /s/ _____ **DATE:** 4/25/02

WITNESS SIGNATURE: /s/ _____ **DATE:** 4/25/02

EXHIBIT E

EXCERPTS OF DEPOSITION OF STEPHEN BRIAN PETERS

[p.77]

A. Yes, sir.
Q. In that same day?
A. Yes, sir.
Q. Always or sometimes?
A. Sometimes.
Q. Depending on what?
A. If the store is on ad, which means if the store is on sale, if it has 12-packs are cheap, or two liters are cheap, or half liters or what have you, second service, sometimes third service.
Q. Same day?
A. Same day.
Q. All right. What does it mean in your business, or in that business, in the merchandising business to see on ad?
A. On sale.
Q. Products are on sale?
A. Yes, sir. That means that if Coca-Cola is on ad, they're on sale. They have an ad in the paper, on ad.
Q. So if a store is on ad, say at Albertsons they've run in the newspaper an advertisement of two liter Coca-Colas for 99 cents or something --
A. Yes, sir.
Q. -- is that a good example?
A. Yes, sir.

[p.78]

Q. And what does that mean to the merchandiser if a store is on ad?

MS. MOLINA: Object to the form of the question. Go ahead.

A. That means that you may have to go back and second service or third service that store.

Q. (By Mr. Presnell) Because there's more products being sold?

A. More volume, yes, sir.

Q. More volume. So you've got to restock shelves more often?

A. Yes, sir.

Q. What's a hot ad?

A. A hot ad is, for instance, 12-packs for $1.99. If I recall, that's what I would call a hot ad.

Q. Well, what's the difference between being on ad and a hot ad?

A. A hot ad is an ad that the sodas that, you know, are a lot cheaper than what they're normally supposed to be, that's a hot ad.

Q. Substantial discounts?

A. Yeah.

Q. So if you can get a six-pack of Coca-Cola for 99 cents, that's a hot ad?

A. That's a hot ad.

[p.79]

Q. All right. So if we continue with your day, you finish the second store, you go to the third store and merchandise that store?

A. Yes' sir.

Q. And then you do the same with the fourth and fifth?

A. Yes, sir.
Q. Then when you finish with your last one, you clock out?
A. Yes, sir.
Q. By phone?
A. Yes, sir.
Q. And you go home?
A. Yes, sir.
Q. You do not have to report to the Coca-Cola facility?
A. No, sir. You might have to report to your supervisor to let him know that you're done for the day.
Q. Okay. How do you make that report?
A. Paging, let him know that you're finished for the day, he'll say "Okay, clock out," and you go home.
Q. Do yon physically talk on a mobile phone, or is it through a pager system?
A. Mobile phone.
Q. So you page your supervisor and he or she then

[p.80]

calls you; is that right?
A. Yes, sir.
Q. And you say "I'm done"?
A. Yes, sir.
Q. What's the purpose of calling the supervisor to let him know you're done?
A. To see if anyone needs any help on the route, or if there's any other stores that need service that someone hasn't done yet.
Q. To help out other merchandisers?
A. Yes, sir.
Q. Okay. Did that ever happen to you, when you would call in to clock out, say you were finished and your supervisor says, "I need you to cover another store for me"?
A. All the time.

Q. All the time?
A. Yes, sir.
Q. Okay. Did that happen more frequently when a store was on ad or there was a hot ad being run?
A. I'd say so.
Q. Okay. Who did you call when you were finished with your stores?
A. My immediate supervisor.
Q. Okay. Who was that?

* * *

[p.85]

needs are for those stores he has?

MS. MOLINA: Object to form, speculation. Go ahead.

Q. (By Mr. Presnell) Is that right?
A. The account manager has a route, just like I have a route. He has certain stores that he has to fill up with sodas, as far as he knows what to order.
Q. Right.
A. He has a route.
Q. Okay.
A. Just like I have a route.
Q. And an account manager is only responsible for his route, or is he responsible for other account manager's routes?
A. As far as to my knowledge, he's only responsible for his route.
Q. Okay. So that account manager would only have knowledge of the merchandising needs of his accounts?
A. Of his accounts.
Q. Okay. When you were employed at Coca-Cola Bottling Company between 1999 and 2001, did you ever make any internal complaints at the company?

A. I can't recall. I think I made a complaint as far as after -- I can't recall.
Q. Okay. Something's in your mind. You can't

[p.86]

recall whether you made a complaint or not?
A. Yeah. I mean, if you would rephrase that, as far as a complaint against --
Q. Well, I mean a complaint -- let me try to break it up for you. Maybe that will help you. Did you ever make a formal complaint between 1999 and 2001 about any work-related problem?
MS. MOLINA: Objection, ambiguous, vague. Go ahead.
A. Not that I recall.
Q. (By Mr. Presnell) Okay. Do you recall ever completing a complaint type form or any other type of written form about any work-related problem?
MS. MOLINA: Same objection. Go ahead.
A. Oh, I think to Bill Donnelly about the conversation we got into. Maybe that's -- if I recall, I might have filled something out about that.
Q. (By Mr. Presnell) Okay. Do you remember any other written complaints you may have made during that time?
A. I can't recall.
Q. Okay. What was the nature of your complaint against Mr. Donnelly?
A. The nature of it was that he came in the store hollering at me.

[p.87]

Q. And your complaint was what, in general terms?
A. I can't recall everything that I wrote in the complaint, but it was probably based on disrespect, disrespecting me.

Q. Did you ever complain, whether formally or informally, that Mr. Donnelly discriminated against you because of your race?
A. I can't recall.
Q. Did you ever make any complaints, formal or informal, that somebody at somebody at Coca-Cola discriminated against you because of your race?
A. By "any complaints," do you mean -- are you asking me did I make any complaints at Coca-Cola?
Q. Correct.
A. I never made any complaints at Coca-Cola, filled out any complaints at Coca-Cola.
Q. Okay. Did anyone ever make any complaints against you while you were at Coca-Cola?
A. Any complaints against me as far as, what kind of complaints?
Q. Work-related conduct, you acted inappropriately or you did this or did that.
A. Mr. Donnelly.
Q. Any others, that you recall?
A. Not that I recall.

[p.88]

Q. Was Mr. Donnelly's complaint against you, did it arise out of the same incident that your complaint against him arose out of?
A. Yes, sir.
Q. Okay. There weren't two separate incidents that we're talking about?
A. No, sir.
Q. Okay. What year was the incident with Mr. Donnelly that resulted in these complaints?
A. If I'm not mistaken, I think it was 1999.

Q. Did Coca-Cola take any disciplinary action against you arising out of those complaints?
A. Yes, sir.
Q. What was the discipline?
A. I think I was suspended for two days, if I'm not mistaken.
Q. Were you given any warnings?
A. Any warnings?
Q. As part of that discipline.
A. An a warning, you mean afterwards, or -- no, sir.

Q. That's a good clarification. Let me restate the question. In addition to the two-day suspension, were you warned that further incidents could result in termination.
A. Not that I recall, as far as --

* * *

[p.121]

Q. All right. He told you that he needed you to work on September 30, 2001, Sunday?
A. Yes.
Q. What was your response?
A. I told him that I had plans, and I wasn't feeling well all that week. I stated that to him.
Q. Did you tell him anything else?
A. I can't recall. I think that's all I told him.
Q. Do you recall anything else about the conversation?
A. He told me to report to work -- he said, "I'm not asking you to come to work, I'm telling you to come to work. If you do not come to work, it could lead to insubordination and could lead to termination."
Q. That's what Mr. Grado told you?
A. That's what Mr. Grado told me.
Q. In the same phone conversation?

A. In the same phone conversation.
Q. Okay. And did you provide a response to that statement by Mr. Grado?
A. Yes, I did.
Q. What was your response?
A. I told him -- that's when I stated to Mr. Grado that I had plans, and that I wasn't feeling well all week. And then I just told him to do what he got to do and I'll

[p.122]

do what I got to do.
Q. You told Mr. Grado that on September 28th?
A. Yes, sir.
Q. What did Mr. Grado say?
A. That was all. That was the end of the conversation.
Q. Do you remember anything else about the conversation?
A. No, sir.
Q. Okay.
A. That was it.
Q. What plans did you have for Sunday, September 30th, 2001?
A. Originally, I had planned to go out of town for the weekend. But like I said, I told him that I wasn't feeling well, so I went to the doctor's on Saturday.
Q. But your plans were to go out of town?
A. Originally, yes, sir.
Q. All right. But when you told Mr. Grado that you had plans, those were the plans you were talking about, going out of town?
A. Originally, they were. Originally, they were to be of town. But then I wasn't feeling well all that week, so I was going to go to the doctor and postpone my plans.

[p.123]

Q. Okay. When did you postpone your plans?
A. Oh, Saturday. I mean, later, like Friday when I wasn't feeling well, I didn't go.
Q. Okay.
A. I still wasn't feeling well, so I didn't go. I didn't pursue my plans.
Q. All right. Your original plan --
A. Was to go out of town.
Q. And I'm talking about the plans that you told Mr. Grado that you had. Is that the plans you're talking about?
A. The plans that I told Mr. Grado?
Q. Correct.
A. The plans that I told -- I told him that I had plans.
Q. Okay.
A. My original plans was to go out of town.
Q. All right. Let me stop you there.
A. Okay.
Q. Where were you going?
A. Las Cruces.
Q. For what purpose?
A. To meet some friends.
Q. Okay. What friends?
A. Some friends of my cousin.

[p.124]

Q. Who is your cousin?
A. Aaron.
Q. Aaron. What is his last name?
A. Thomas.
Q. Where does he live?
A. Albuquerque, New Mexico.
Q. Okay. Aaron Thomas?

A. Yes, sir.
Q. All right. Was Aaron going with you?
A. Yes, sir.
Q. Okay. Was anybody else going with you?
A. No, sir.
Q. And who were the friends you were going to visit in Las Cruces?
A. Actually, they were friends of his, and I was going with him.
Q. Who were these people you were going to see?
A. One's name was Monica, and I can't think of the other one's name.
Q. Monica is a female?
A. Yes, sir.
Q. You don't remember her last name?
A. No, sir.
Q. Was the other person a female or a male?
A. Yes, sir, female.

* * *

[p.133]

name.
Q. You mean a person or a hospital or clinic?
A. No' it's -- I can't think of it. I know where it's at, but I can't think of the name right now.
Q. Where is it?
A. It's off the freeway, right next to -- let me think. Down there by Petsmart, that big building down there. I can't think of the name, I can't think of what it is. Blue Cross Blue Shield.
Q. Okay. What does she do there?
A. She's on the computer, I guess, whatever they do with claims or whatever.

Q. Okay. How long has she been working there?
A. I don't know how long.
Q. A few months, or longer?
A. Oh, no, longer than that, yeah.
Q. Okay. What's her telephone number?
A. 270-3537.
Q. Is that home?
A. Cell number.
Q. Okay. Does she have a home line?
A. Yes. I have it programmed in my phone. I don't know it off the top of my head, her house number.

Q. Okay. Do you usually communicate with her by cell phone?

[p.134]

A. Yes, sir.
Q. After September 28, 2001, when was your next communication with Mr. Grado?
A. After -- excuse me?
Q. After your conversation with Mr. Grado on September 28, 2001, when was your next communication with Mr. Grado?
A. That Monday.
Q. October 1, 2001?
A. Yes, sir.
Q. Where were you?
A. At work, at a meeting for -- a health meeting, if I'm not mistaken.
Q. This is at the plant?
A. Yes, sir.
Q. Did you work Monday, October 1?
A. Yes, sir.
Q. Did you do your merchandising that day?
A. Yes, sir.

Q. All your stores?
A. Yes, sir.
Q. That morning, you just had a meeting regarding some health issues?
A. No, it wasn't that morning. It was that evening.

[p.135]

Q. All right. I'm sorry.
A. I worked all day.
Q. You worked all day?
A. I worked from 5:00, if I'm not mistaken, until 5:00.

Q. Okay. And then you went to a meeting?
A. Yes, sir.
Q. All right. What kind of meeting was it?
A. I think it was for health insurance, if I'm not mistaken.
Q. Okay. And this is back at the Coca-Cola facility?
A. At the plant, yes.
Q. And you saw Mr. Grado there?
A. Yes, sir.
Q. All right. Did you talk to him by phone that day, October 1, 2001?
A. I can't recall that I had. Huh-uh, no, sir, I don't think so.
Q. All right. Did you have a conversation with Mr. Grado that evening?
A. Yes, sir.
Q. Tell me the substance of the conversation.
A. I was sitting in the meeting, and Mr. Grado walked up to me and said, "I need you to be down at the

[p.136]

plant at 8:00 in the morning."
And I said "Okay."

Q. Okay.
A. And that was it.
Q. That was it?
A. Uh-huh.
Q. Did he tell you why?
A. He didn't tell me why, no, sir.
Q. Did you ask why?
A. I didn't ask why, no. He just said to meet him at the plant. He walked by and he stopped. It was during the meeting.
Q. Okay.
A. He just told me, "Meet me down at the plant at 8:00 tomorrow morning."
Q. What did you say?
A. I said "Okay," and he walked away.
Q. Okay. Anything else involved in that conversation?
A. No, sir.
Q. All right. Did you talk to Mr. Grado on any other occasion that day, October 1, 2001?
A. I can't recall.
Q. Did you talk to Mr. Grado on Saturday, September 29th, 2001?

* * *

[p.157]

Q. And again, we're talking Friday, the 28th of September 2001. When you told Mr. Grado you had plans, did you tell him those plans were to go visit these two girls in Las Cruces?
A. No, sir.
Q. Okay. Have you seen a physician since September 29, 2001?
A. September 29, 2001. Not that I recall.

Q. You've got Exhibit 3 there, the Complaint in this case. Do you understand that the EEOC in this lawsuit is claiming that you were terminated from your employment because of your race?
A. Yes, sir.
Q. Do you have any evidence that you were, in fact, terminated because of your race or the color of your skin?
A. Yes, sir.
Q. Okay. What is that evidence?
A. That no one else, no non-Afro-Americans have been treated as I have been treated, as far as none of them got terminated for calling in sick. And other Afro-Americans had made other complaints against Mr. Grado.
Q. Okay. Any other evidence?
A. I can't think of none at this time.
Q. Okay. So the evidence you have are two parts --

[158]

and I want you to tell me if I'm saying this correctly, because I want to make sure I understand -- that non-African-Americans were treated differently because they were not terminated for calling in sick; is that what you told me?
A. Now, what's that again? How did you say that?
Q. I asked what the evidence was that your termination was because of your race, and I think one of the things you said was because non-African-Americans were treated differently because they were not terminated for calling in sick.
A. Yes, sir.
Q. Okay. Did I state that correctly?
A. Yes, sir.
Q. And then the other piece of evidence that you said supports that claim is that other African-Americans were treated poorly by Mr. Grado?
A. Yes, sir.

Q. All right. What non-African American employees were treated differently by not being terminated for calling in sick?
A. You mean names?
Q. Yes.
A. James Young.
Q. Okay.

[p.159]

A. I mean, are you asking me as far as like, you said not calling in sick. I mean, I'm saying -- the names that I'm giving you all have problems with Mr. Grado.
Q. Okay.
A. Do you understand what I'm saying?
Q. I don't think you and I are talking about the same thing, so let me start over.
A. Okay.
Q. Which non-African-American employees at Coca-Cola were treated differently?
A. Were treated differently as far as didn't get treated as bad as I did; is that what you're asking me?
Q. Correct. I'm going back to, I asked you, you know, for the evidence to support that claim, and you said that non-African-Americans were treated differently.
A. Yes.
Q. And I'm asking you, who are those people?
A. Damian Mirabal, Arturo Lopez -- let me think. Kelly Sage, let me think here for a minute. I can't think of any more at this time. There is more, but I can't think right off the top of my head their names.
Q. Damian Mirabal, Arturo Lopez and Kelly Sage?
A. Uh-huh.
Q. Yes?
A. Yes. I'm trying to think of -- there's more,

[p.160]

but I can't think of them right off the top of my head right now.

Q. Okay. Well, do you need a minute to think about it?

A. Yeah. Can I have one minute?

MR. PRESNELL: Sure. Do you want to take a break to think about it for a second? I could use some water, anyway, so why don't we do that.

(A recess was taken.)

A. Okay. Monica Lovato.

Q. (By Mr. Presnell) Monica Lovato?

A. Yes, sir.

Q. Is that it?

A. There's more, but I can't -- let me think here. That's all that I can recall.

Q. Okay. What position did Mr. Mirabal have?

A. Merchandiser.

Q. All right. What about Mr. Lopez?

A. Merchandiser.

Q. Mr. Sage, what was his position?

A. Truck driver.

Q. Truck driver?

A. Yes, sir.

Q. Is that different from a merchandiser?

A. Yes, sir.

EXHIBIT F

EXCERPTS OF DEPOSITION OF PATRICIA K. EDGAR

[p.38]

Q. And so after that conversation, did you talk to Grado on Friday?
A. No, I don't believe so.
Q. Did you talk to anybody on Friday concerning Mr. Peters?
A. I might have talked to Sherry.
Q. You might have? You're not too sure?
A. I don't remember if I talked to Sherry. My recollection is I talked to Sherry late on Friday, more towards 4:00 or 5:00 p.m., and/or it could have been Monday, but . . .
Q. So on Friday you made the decision that Mr. Peters had been insubordinate?
A. On Friday there was sufficient evidence that he was insubordinate.
Q. Based on what Grado told you?
A. That's right.
Q. And on Friday, you hadn't talked to anybody about Grado?
A. That's correct.
Q. And what does it mean that you had sufficient evidence on Friday?
A. Well, if I, in fact, did talk to -- well, evidence that he refused to try calling, evidence according to Grado.

[p.39]

Q. Sufficient evidence to terminate Mr. Peters?

A. Yes, that was sufficient that he violated the insubordination rule.
Q. So after you talked to Grado, was that sufficient evidence to terminate Peters?
A. Yeah. I felt that actually had happened, and I believed Mr. Grado, if that's your question.
Q. Why did you believe Mr. Grado?
A. Why did I believe him?
Q. Yes, ma'am.
A. Because he had just gotten off the phone and gotten back on with me, and he was just very credible, and I did believe him.
Q. Is he very credible to you?
A. Are talking about in general?
Q. In general, do you find Mr. Grado to be very credible?
A. Yes.
Q. Okay. So had you ever talked to Mr. Peters -- I understand you never met Mr. Peters; is that correct?
A. Yeah.
Q. You don't know who this guy was?

[p.40]

A. Right
Q. Had you ever talked to him on the phone?
A. I don't believe so.
Q. Okay. Had you ever heard anything about Mr. Peters prior to this conversation with Grado on Thursday, Friday?
A. Not that I recall, no.
Q. Okay. So you had no basis to say that Mr. Peters could not be credible?
A. Mr. Peters?
Q. Yes.
A. Yeah. I wasn't thinking that Mr. Peters was not credible.

Q. you just thought that what Mr. Grado said happened, happened, and you were good with that, and you made your decision that Mr. Peters was insubordinate?
A. That's not when I made my decision.
Q. When did you make your decision?
A. I believe I talked to Sherry on Friday afternoon.
Q. Okay. So after you talked to Sherry, you made your decision?
A. Yes, pretty much.
Q. What did you talk to Sherry about?

[p.41]

A. I want to clarify whether I talked to her on Friday afternoon. My recollection is it was Friday afternoon or Monday. But when I talked to Sherry, I asked her to pull the file. And what Cesar Grado had related to me regarding Mr. Peters and the conversation he had with him, there was a similar incident in the file from 1999 with a whole different set of players that added credibility to Mr. Grado's recount of what also had happened.
Q. Okay. So you spoke to Sherry Pederson, who relayed some information to you. And based on what Sherry Pederson told you in that conversation, that's when you -- after you received that information, that's when you made your decision?
A. Well, I believe that we had a talk on Monday. So it's not as if -- I still -- I had the information, but I can't tell you 100 percent when I made the decision. I can tell you that there was sufficient violation of policy on Friday.
Q. So why wasn't he fired on Friday?
A. I think he was at home.
Q. He didn't work Friday?
A. No. I think he had already gone home.
Q. So it was Friday at what time?
A. I think they get off at 2:00 or 3:00. I

EXHIBIT G

EXCERPTS OF DEPOSITION OF SHERRY L. PEDERSON

[p.30]

position, Senior HR Administrator in 2001; is that correct?
A. Yes.
Q. Okay. What kind of information would be brought to you in this assisting with the discipline process?
A. Whatever the issue was with the employee. It could be anything.
Q. Did you ever receive any recommendations for managers with regard to discipline?
A. Sometimes.
Q. But these recommendations were subject to your approval?
A. Yes.
Q. What management positions -- did you ever receive any recommendations from district sales managers?
A. Not specifically, that I can recall.
Q. Okay. And once you received the information -- just generally we're talking about the process -- what would you do with the information?
A. I would then determine, according to our policies and rules and regulations and our discipline -- progressive discipline procedures,

[p.31]

what rule, regulation or policy may have been violated. And if I felt I had all the facts, then would determine what type of discipline would be taken.

Q. Was your determination as to the type of discipline to be taken subject to anybody else's approval?
A. If it was a possible termination, all terminations would go through Pat Edgar.
Q. So you would make a recommendation to Ms. Edgar with regard to discipline that involved terminations?
A. I would give her my opinion, yes.
Q. How would you go about -- what would cause you to feel that you had all the facts to allow you to make the determination concerning discipline?
A. I rely on management to give me those facts, but if there was someone else involved that I felt I needed to go back and get more information from, I would do that.
Q. Okay. Someone else, could that someone else be the employee in question?
A. It could be, or a witness.
Q. Do you have a sense of whether you ever did go the employee or to a witness after you

[p.32]

received facts from a manager concerning discipline where you did go to a witness or the employee?
A. I don't remember a special instance, but yes, I'm sure I have, yes.
Q. Okay. And when you had done that, would you make any record of interviewing individuals or talking to individuals, nonmanagement individuals?
A. Sometimes.
Q. What factors would you -- strike that. Why would you sometimes and not sometimes?
A. Depending on the information you got from a witness or employee, him or herself related to the case, you wouldn't necessarily record the information, it just depended how it related to the case?

A. Each case was looked at individually, and that's the best answer I can give you.
Q. Okay. And we're going to go through some of those disciplines.
A. Okay.
Q. I will ask you specifically. That may be a better way to go through to figure out this process.

[p.33]

Just generally, how was the information presented to you by the managers with regard to discipline issues?
A. Sometimes it was verbally. And sometimes they would, you know, write it down or type it up, some of the basic information.
Q. Okay. And then after -- say you got information that was written down -- say you got information that was verbally presented to you. Would you make any record of that information that was presented to you verbally?
A. It depends on the case.
Q. Okay. What about a case would cause you -- is there anything in particular about a particular case that would cause you to record verbal information presented to you?
A. I can't think of an example.
Q. Okay. Would the severity of the discipline at issue or the severity of the conduct at issue that was brought to your attention, would that have any bearing on whether you recorded information presented to you verbally?
A. It may.
Q. Okay. So severity of the violation?
A. It may.

EXHIBIT H

EXCERPTS OF DEPOSITION OF CESAR M. GRADO

[p.30]

Q. -- is that correct?
A. Yes.
Q. Okay. And if that employee does not do that which has been asked of him, that could be insubordination.
A. And I said no.
Q. And I asked why.
A. Because I did not explain to the employee that it was a directive, He was not being told.
Q. Okay. So -- okay. So he's not being told what?
A. He's not being given that direct order. He's not -- if I sit and say, "I am giving a directive to answer my page. If you do not answer this page, that could be considered insubordination," then it could be considered insubordination when he does not answer the page.
Q. So if you -- if you -- if you're telling an employee to do something and you put it in terms of, "This is, this is a directive, and if you don't do this, it's insubordination" --
A. It could be.
Q. -- that's different from an employee -- "I'm telling you to do something. Do it"?
MR. PRESNELL: Object to the form.

[p.31]

A. It could be. I would put it in front of HR. and they would make that decision for me.
Q. Before what point? What decision would HR make?

A. Before any -- anything is -- any action is taken, before it's considered insubordination. I don't -- I don't -- I don't make those decisions. HR makes those decisions, not me.
Q. Whether -- whether somebody is to be considered as being insubordinate --
A. Yes.
Q. -- with regards to the workplace --
A. Yes.
Q. -- rules is not your decision?
A. That's not my decision.
Q. Is it your -- is it within your authority to tell somebody that if they don't do -- if they don't follow your directive as their manager, that it's insubordination?
A. It could be considered insubordination.
Q. Could be?
A. Could be, yes.
Q. Not that it would be?
A. Not that it could be -- would be. I mean, I gather the facts and I present them to our HR

[p.32]

department, and they decide whether it is an insubordination or not and whether there's action to be taken or not.
Q. We'll come back to that. We can clarify the record as to your response, sir. How about a failure to respond -- we're going back to a supervisor's page, okay? After a supervisor makes several attempts to get a hold of employees' what do you consider that?
A. I don't know. I don't know what that would look like. Again, I will put the facts in front of HR, and we -- they would make the decision -- not me. But that's all I would do is put it in front of HR, Sherry Pederson or Pat Edgar.
Q. How about an employee who does not return to work when he's told to return to work, is that insubordination?

A. Again, I don't know. I don't know.
Q. How about an employee not following written instructions given by a supervisor, is that insubordination?
A. It could be. It could not be. I mean --
Q. What wouldn't make it --
A. I would present the facts to HR and go from there.
Q. What would make it insubordination, when you

[p.33]

say it could be?
A. We -- I -- HR considers insubordination when they are given a directive, and they have understood they have been given a directive, and that is explained to them before they even -- or if I ask you to do a directive -- you know, "I'm asking you to do a directive because I just explained that to you, and if you don't do it, that could be considered insubordination. Do you understand what I'm telling you," and you as an employee either understand or you don't understand.

And if you don't understand it, my job is to make sure you understand. That's being clear. Communication has to be clear. "If you don't understand what I'm asking, you better ask me to be clear or ask me what it is that I'm asking so I can be clear. But once we establish what it is we are asking you to do" --
Q. Going back to my original question, with regards to an employee not following written instructions given by a supervisor, and you said that that could be insubordination, why could that be insubordination?
A. It could be considered insubordination.
Q. Why?

* * *

[p.70]

A. HR.
Q. Who is HR?
A. Sherry Pederson.
Q. Have you ever had a decision -- have you ever had a recommendation to hire somebody who was not approved by HR?
A. That happens all the time.
Q. It happens all the time?
A. Yes.
Q. When was the last time it happened?
A. Just recently. I don't know exactly.
Q. When recently?
A. I don't know. Just been recently.
Q. In the last week?
A. No.
Q. Last month?
A. No.
Q. In the last six months?
A. Yes.
Q. Okay. So the last six months you made a recommendation to HR. --
A. Uh-huh.
Q. -- on a candidate for a position?
A. Yes.
Q. What position was it?

[p.71]

A. Merchandising.
Q. And HR did not approve your recommendation?
A. HR did not approve, yes.
Q. Do you know why?

A. I did not get the specifics. I'm not privileged to that information.
Q. Okay. In the last year, other than this one, has there been anybody else?
A. Yes.
Q. Who?
A. I don't know, but there has.
Q. How many others?
A. I couldn't be specific.
Q. Okay.
A. There's so many people that come through Coca-Cola, so -- I mean --
Q. But in the last --
A. -- a lot of people.
Q. In the last six months, one of your recommendations was turned down?
A. It was more than.
MR. PRESNELL: Object to the form.
Q. It was more?
A. Yes.
Q. How many more?

[p.72]

A. I don't know how many.
Q. Okay. And who in HR is the person who approves your recommendations? Is that Sherry Pederson?
A. Uh-huh.
Q. Is that right?
A. Uh-huh.
Q. Does she have final authority to approve your recommendation?
A. Yes, she does.
Q. Who is her supervisor?
A. Now?

Q. Yes.
A. I believe her name is Tammy Erickson.
Q. Okay. And you said that you've also made recommendations to Pat Edgar concerning people you want to hire.
A. No, I've never made a recommendation to Pat Edgar.
Q. You have not?
A. No.
Q. With regard to hiring employees, have you ever had any reason to work with or through Pat Edgar?
A. One more time? I'm sorry.
Q. Okay. I will rephrase it. With regard to

[p.73]

your authority to the extent that you have described to hire employees, have you ever worked with Pat Edgar?
A. Not that I remember.
Q. Okay. Okay. With regard to your authority to -- do you have the authority to fire individuals?
A. No.
Q. You have no authority to fire?
A. No.
Q. At all?
A. At all.
Q. Do you have the authority to make recommendations to fire people?
A. I could make recommendations.
Q. What do you mean you could?
A. I -- I simply put facts together and put them in front of HR. You know, if somebody hits me across the head, for example, I mean, that's horrible, so I make a recommendation. But I, don't have the authority.
Q. You don't have the authority to do what?
A. To terminate.

Q. Let me make sure I understand it; sir. The extent of your authority with regards to terminating an employee's employment, somebody's employment with Coca-Cola, what is the extent of your authority?

* * *

[p.258]

for Sunday.
Q. Okay. So at the second -- are you -- before he said, "I have plans," the second time, he started yelling at you?
A. Could have been, yes.
Q. Okay. So he was yelling at you. So he was pretty much yelling at you. He had already yelled at you when you asked him if he could change -- if he could change from Sunday to work Saturday since he had plans on Sunday.
MR. PRESNELL: Object to the form.
Q. He was -- he had already been yelling at you?
A. He could have been, yes.
Q. Was he already yelling at you?
A. He could have been.
Q. You don't know for sure?
A. I don't know. I don't remember exactly when he started raising his voice.
Q. Okay, so he wasn't yelling. So are you saying -- are you saying raising his voice or yelling?
A. At one point he was yelling.
Q. At what point was he yelling?
A. Okay. When I asked him if he could change his plans.
Q. Okay. When you asked him that, then he

[p.259]

started yelling?
A. He was yelling.

Q. Okay. What was he yelling?
A. He was just answering my questions.
Q. Okay. What did he say?
A. At what point?
Q. In response to that question.
A. When?
Q. When you asked him about changing from Sunday to Saturday.
A. I believe he said no.
Q. Okay. What else did he say?
A. I asked him what his plans were.
Q. Okay. And what did he say?
A. He said it was none of my business.
Q. Okay. And then what happened?
A. And then I explained to him that I was not asking him to report to work on Sunday, that I was giving him a direct order, and failure to follow a direct order would be considered insubordination, and that would be grounds for termination.
Q. Did you say would be or could be considered?
A. It would be considered insubordination, and that those are grounds for termination.
Q. And then what happened?

[p.260]

A. He told me that I can do whatever I needed to do. He was going to do whatever he needed to do. And he said, "You do what you got to do. I will do whatever I got to do."
Q. And then what happened?
A. I hung up the phone. We hung up.
Q. Who hung up first?
A. I don't remember.
Q. And then what happened?

A. Monday morning I got in front of Sherry Pederson and walked her through the whole fact -- the facts of Friday afternoon. And Pat Edgar was already involved by that time, so they had a discussion and they decided that this was insubordination, and they decided it was a termination.
Q. Okay. So after you hung up with Mr. Peters on Friday 9-28, did you then talk to Ms. Edgar?
A. Yeah, I think I did. Yes, I did.
Q. And when you talked to Ms. Edgar on that Friday, what did you tell her?
A. I told her exactly what had happened.
Q. What did you tell her?
A. That I had called Stephen Peters, and I explained to Stephen Peters how I was giving him a direct order, by her advice, and -- and what the

[p.261]

conversation entailed, that he told me I had to do what I had to do, and he would do what he had to do.
Q. Okay. So you first spoke to Mr. Katt?
A. Yes.
Q. And then who did you speak to?
A. I talked to Pat Edgar.
Q. Pat Edgar. And what did you tell Pat Edgar the first time you spoke with her?
A. I called Pat Edgar and asked for advice. I let her know what was going on.
Q. What did you let her know?
A. I explained to Pat Edgar how Stephen Peters had agreed to work on Sunday, and I asked Pat Edgar if there was a -- if we can ask employees to work overtime, or if we were not allowed to ask employees to work overtime.
Q. What else did you tell her?

A. She asked me if I had explored all avenues as far as getting help for the weekend. And I had already asked for help, and I didn't have anybody else to go to but to Stephen Peters. So under her advice, she -- she went ahead and gave me the advice on how to explain to Stephen Peters that I was giving him a directive, and that how following -- not following a directive would be considered insubordination.

EXHIBIT I

EXCERPTS OF DEPOSITION OF JEFF KATT

[p.26]

like 6:00. I can't remember the specific time. And after paging a couple of times, I didn't want to keep paging through the whole night just to let him know when we already had kind of a plan to cover that territory anyway.
Q. So you tried to page Cesar Grado on Saturday night after Mr. Peters called you?
A. Yeah, I believe I did.
Q. -- And you believe it was one or two times?
A. Yes.
Q. And Mr. Grado never called you back on Saturday?
A. Correct.
Q. And you said -- I believe you said, which was not an unusual thing for Mr. Grado to do, not to return his pages; is that right?

MR. PRESNELL: Object to the form.

A. On the -- on a weekend or something like that, if it was towards the end of the night when the day was already covered, a lot of times whatever the emergency was or situation could be could probably be handled the next day. So sometimes pages wouldn't be returned. I mean it wasn't too uncommon if that happened.
Q. (By Ms. Molina) So you're saying that it

[p.27]

wasn't unusual for Mr. Grado not to return a page or a call because routes or jobs or work was already covered?
A. Correct.

Q. Okay. Did you have any code to let him know on the page -- if you sent him a page, say, Saturday night, when Mr. Peters called you, did you have any code that you could enter on the pager to let him know it was an emergency, that he needed to contact you?
A. The only way we would communicate through emergency, you know, if it was really important, just to put a 911 at the end of the page.
Q. Did you put a 911 at the end of your pages to Mr. Grado that night?
A. Not that I can recall.
Q. Why not?
A. I just didn't feel it was an emergency if the route was already going to be covered.
Q. Okay. When was the -- so you're saying that the route for Sunday, September 30th, 2001, was already covered?
A. I believe so, yeah.
Q. And that was the route that Mr. Peters had called in sick -- had called you to let you know

[p.28]

that he would not be able to work; is that correct?
A. Correct.
Q. And how do you know that the route was covered?
A. I communicated with Cesar earlier that day or on Friday we had worked something out on what we would do to cover that route.
Q. At what point in the day on Friday? Now we're on September 28th, 2001; is that right?
A. Okay.
Q. Friday, September 28th. At what point on September 28th was the coverage for the route taken care of?
A. At what point was it taken care of? It was probably, I would guess, say, around 5:00 or 6:00.

Q. Who had the responsibility to make up the schedule?
A. Cesar.
Q. And this was done on a weekly basis?
A. Yes.
Q. So the schedule for the week ending September 28th, 2001, would have been prepared when?
MR. PRESNELL: Object to the form.
Q. (By Ms. Molina) September 28th 2001, was a

[p.29]

Friday. So do you know when the schedule for the week ending September 28th would have been prepared?
A. For the next week?
Q. For that week ending September 28th.
A. That would have been taken care of last week, the week -- that Sunday.
Q. On Sunday?
A. Yeah.
Q. So on Sunday the schedule for the week is prepared?
A. Actually, I think he would try to get it done -- there were times that he got it done earlier, there were times he got it done later, I'm not specifically sure when he would prepare it. Like sometimes we would have schedules on Friday for the next week, sometimes we wouldn't have them until Monday.
Q. So on the schedules -- on the schedules that would be prepared either on Friday or Monday for that week, the week following that Monday, what -- would the schedule include any overtimes, any employees who were scheduled to work overtime?
A. Sometimes they would, but for that specific week, leading up to that week, there was not, I don't believe.

* * *

[p.38]

Q. So was this schedule posted anywhere at the facility to let employees know what their work schedule was that week?
A. I don't know if it was posted.
Q. Do you know how employees would know or merchandisers would know what their schedule was for the week?

A. Typically I would get them from Cesar and hand them out to the employees on my list.
Q. This particular schedule --
A. Yes.
Q. -- for that week? So you would give the schedule to the merchandisers --
A. Yes.
Q. -- under your supervision?
A. Yes.
Q. If there was a change to the schedule, would that change be noted on the schedule?
A. If there was a change, I would typically have to call a merchandiser or that sort of thing and let him know, because typically they wouldn't be reprinted.
Q. Okay. So with regards to Mr. Peters, you had said -- you had testified that there had been something worked out at around 5:00 or 6:00 on that

[p.39]

Friday. That's the 21st, is that correct -- or the 28th; is that correct?
A. Yes.
Q. If you're not too sure of the dates, I can tell you there's been -- it's been established that Friday was the 28th, 29th, and then 30th.

A. Okay.
Q. So how is it that Mr. Grado came to you on Friday at around 5:00 or 6:00 to talk about working out something for Sunday, or how is it that it came to be that something was worked out?
A. I believe he came to me and we had talked about working something out to get that route covered. I can't specifically remember how. I think it involved me going out there and maybe covering something, but I can't remember specifically how we rerouted everything.
Q. Did you have -- did you contact Mr. Grado on Friday concerning the schedule for Sunday other than at the end of the day around 5:00 or 6:00? Did you have any contacts with Mr. Grado concerning the schedule for Sunday?
MR. PRESNELL: Object to form.
A. Just that when he called me to ask Steve -- tell Steve to work on that Sunday.

[p.40]

Q. (By Ms. Molina) So Mr. Grado called you?
A. That's correct.
Q. On?
A. On Friday.
Q. When on Friday?
A. I would say it was probably around 2:00.
Q. Had Mr. Grado called you at any other time concerning Mr. Peters working on Sunday?
A. No.
Q. When Mr. Grado called you, what did he say to you?
A. He said, "We're going to be short someone, and I need -- tell Stephen Peters he has to work on Sunday." I'm trying to recall the conversation to the best of my ability. Its been a little while. But he said something to the effect of -- I had kind of had a conversation with him at that point and said,

you know, "I think he worked the prior Sunday or something." He had worked six days. And I said, you know, "He's not going to work six days this week." And he said, "Tell him he has to. I'm not giving him a choice." He kind of made a statement about how -- let him know that if he doesn't work, that he can have his days off reassigned, that I can reassign his days off. At that point I called

[p.41]

Steve.

Q. And what did you tell Steve?

A. I said, "Steve, I need for you to work on Sunday. We're short people."

Q. And what did Mr. Peters say?

A. He said, "I can't do it. I've got plans."

Q. And then what happened? Did he say anything else?

A. We just -- I mean there might have been casual talk. I can't remember. But where it ended, basically, is he was going to call Cesar.

Q. Did you ask Mr. Peters to call Mr. Grado?

A. No.

Q. Did Mr. Peters say that he was going to call Mr. Grado?

A. Yeah. I can't remember if I asked him -- I don't think I did.

Q. And your recollection is that this was around 2:00 in the afternoon?

A. Approximately.

Q. Why do you think it was 2:00 in the afternoon?

A. Because it was towards the end of the day.

Q. Towards the end of your workday?

A. Exactly.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ-02-1644
JOB/RHS

[Filed March 19, 2004]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, d/b/a PHOENIX COCA-COLA BOTTLING COMPANY and COCA-COLA BOTTLING COMPANY OF ALBUQUERQUE, Defendant.	)

EXHIBITS TO PLAINTIFF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

Mary Jo O'Neill
Regional Attorney

C. Emanuel Smith
Supervisory Trial Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Phoenix District Office
3300 N. Central Ave.
Suite 690
Phoenix, Arizona 85012
/s/
VERONICA A. MOLINA
Trial Attorney

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ-02-1644
JOB/RHS (ACE)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, d/b/a PHOENIX COCA-COLA BOTTLING COMPANY and COCA-COLA BOTTLING COMPANY OF ALBUQUERQUE, Defendant.	)

AFFIDAVIT OF
STEPHEN B. PETERS

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

I, Stephen B. Peters, duly sworn, hereby state as follows:

1. During my employment with Coca-Cola Bottling Company of Albuquerque, I was never written up for job performance problems, nor attendance problems.

2. During my employment with Coca-Cola Bottling Company of Albuquerque, I was considered a good merchandiser at stores under my responsibility. Attached hereto as Attachments 1 and 2 are letters of recommendation.

3. In the year 2001, I was awarded a certificate from Coca-Cola Enterprises for my five years of "service, dedication and commitment to the company." Attached hereto as Attachment 3 is copy of the certificate.

4. During my last full week of employment at Coca-Cola, I worked from Sunday,

5. I did not receive a "final warning" in 1999.

6. When I told Cesar Grado to "do what he got to do and I'll do what I got to do" I meant was to end the conversation as far as getting into any confrontation with Mr. Grado.

7. Because I was still not feeling well on Saturday, September 29 and Sunday, September 30, 2001 I stayed home the entire weekend to get better so that I could return to work on Monday, October 1, 2001.

8. Jeff Katt worked on Monday, October 1 and Tuesday, October 2, 2001.

9. In the year 2001, I worked under the immediate supervision of Jeff Katt, Account Manager, who supervised my work on a day to day basis up until I was fired on October 2, 2001.

10. Up until my termination from Coca-Cola in October 2001, I had never been fired from any of my previous jobs.

11. African American employees were treated worse by Cesar Grado as compared to non-African American employees.

12. During my employment with Coca-Cola, I never knew of anyone other than the District Sales Manager to have the authority to discipline employees.

13. During my employment with Coca-Cola, I was never told that Human Resources staff had any authority to discipline employees.

14. During my termination on October 1, 2001 no one told me that Patricia Edgar had fired me.

15. During my employment with Coca-Cola, I never heard of Mr. Grado trying to find coverage for routes on a volunteer-basis and then by rotation. Mr. Grado just picked people to work.

16. During my employment at Coca-Cola, I complained to James Young on several occasions that I felt I was being treated differently because I was African-American.

17. During my employment at Coca-Cola, I do not remember receiving any training or instruction on race discrimination.

18. During my employment at Coca-Cola, I believed Cesar Grado had the authority to discipline employees, including firing employees.

19. When Coca-Cola was running ads in chain stores and extra coverage was needed, I would do extra stores and provide the coverage.

20. I believe that if Grado was going to be short one merchandiser the weekend of September 29-30, 2001 he could have denied Rivera's request to miss his regularly scheduled days if it was such a high volume.

21. During my employment at Coca-Cola, on numerous occasions I covered routes of employees who had called in sick or who didn't show up for work (no call, no show).

22. On Monday, October 1, 2001 when Arturo Lopez never showed up for work, I covered some of Mr. Lopez's route. I believe I asked Jeff Katt about Mr. Lopez and if he was coming to work that day, and I believe Mr. Katt said that Mr. Lopez was a no-call, no-show.

23. I was never asked to work on Saturday, September 29, 2001.

24. I was never given the option of working either Saturday, September 29 or Sunday, September 30, 2001.

25. I never told Jeff Katt that I was going to call in sick on Sunday, September 30, 2001.

26. I never told Jeff Katt that I could work on my days off on the upcoming weekend.

27. During my employment with Coca-Cola, if we were one merchandiser short, the available merchandisers would split up the stores needing coverage and cover the route. This happened numerous times.

28. On Friday, September 28, 2001 I told Cesar Grado I could not work on Sunday because I had plans and I was not feeling well. At no time did Mr. Grado ask me what my plans were, or about my not feeling well.

29. I never told Mr. Grado that I was refusing to work on Sunday, September 30, 2001. Mr. Grado never told me that my behavior was insubordination.

30. On Friday, September 28, 2001 I worked over eleven hours and I did not leave work at 2:00 p.m.

31. I share my home with my 84-year-old father.

32. I did not have an exit interview after I was fired from Coca-Cola.

33. In the year 1999, at 4:00 a.m. on a Wednesday I was notified that that my fiance's son and his uncle had been killed in a car accident. I paged Eddie Esq Esquibel immediately after to inform him that I did not think I would be able to report to work because of what had happened. Mr. Esquibel told me that he needed me to come in to work, and I proceeded to tell him that this was my fiancé of over four years and that she needed me. Mr. Esquibel asked me if I could go in for a few hours; and I told Mr. Esquibel that she was very upset and I didn't think that I could. Mr. Esquibel then said okay, take the day off. I took leave that day. I reported to work the following day and worked the full day. On Friday, I

reported to work and around midday on Friday, Mr. Esquibel told me that I had to work Saturday, my scheduled day off. I told Mr. Esquibel I could not because I was going to be a pall bearer at the funeral. Mr. Esquibel told me I had to come to work anyway. Mr. Donnelly, District Sales Manager, showed up at my store that Friday. When he came into the store I was working and when he saw me he yelled "Stephen Peters, outside now." When I got outside, I told Mr. Donnelly that I did not appreciate him yelling at me and embarrassing me in front of customers. He said that he had heard I could not work Saturday. I told him I could not because of I was going to be a pall bearer at the funeral. That's when he said, "was he your biological son" and I said he was not, but I treated him as if he was my son. Mr. Donnelly then said "I don't know what to tell you then, if he was not your biological son." Then I said to Mr. Donnelly that "if it was your fiancé of four plus years, and her son was killed tragically, God forbid, in a car accident, would you go to the funeral on your scheduled day off?" At that point he told me to go home, that I was being insubordinate. At no time did I curse at Mr. Donnelly' or Mr. Esquibel' nor did I raise my voice at them.

34. During my employment with Coca-Cola, I never missed a day from work for illness. The first day I was ever off on sick leave was the Wednesday when I notified Coca-Cola about my fiance's son. That was the very first time I had ever called in to report off work.

SUBSCRIBED AND SWORN to before me this 17th day of March, 2004 by Stephen B. Peters.

My Commission Expires:
12/12/06

/s/ _____
Stephen B. Peters

/s/ _____
Notary Public

OFFICIAL SEAL
Margie E. Sanchez
Notary Public
State of New Mexico
My Commission Expires 12/12/06

ATTACHMENT 1

October 8, 2001
To Whom It May Concern:

This letter of recommendation is for Stephen Peters. He was employed by Coca-Cola, and serviced us here at Raleys #803. He was always on time and took great care of us. Stephen would be a great asset to your company. If you have any further question feel free to give me a call.

Thanks,

/s/_____
Mike Cherry
Asst. Manager #803
505-292-1695

ATTACHMENT 2

ALBERTSONS #911
2801-A EUBANK BLVD. NE.
ALBUQUERQUE NM. 87112

AS A MERCHANT, PREVIOUSLY SERVICED BY STEVEN PETERS WITH COCA COLA, I GIVE REFERENCE TO THE JOB PERFORMANCE HE HAS PERFORMED IN MY STORE. THE JOB HE PERFORMED WAS AT THE UTMOST PROFESSIONAL LEVEL. I RECOMMEND HIM AS A VALUED EMPLOYEE WITH ANY ORGANIZATION HE SO CHOOSES TO BECOME EMPLOYED. STEVEN IS OF GOOD HUMOR AND GOOD WORK ETHICS. IF I CAN BE OF ANY FURTHER INFORMATION, PLEASE GIVE ME A CALL.

ALBERTSONS #911

/s/_____
PHIL STEPHENS
GROCERY MANAGER
505-298-7571

ATTACHMENT 3

Coca-Cola Enterprises

Thank You For Your
Years of Service

Coca-Cola Enterprises and the Phoenix Coca-Cola Bottling Company:

Thank you **Stephen Peters**, for 05 years of service, dedication, and commitment to the Company.

We sincerely appreciate your past contribution and look forward to the future with excitement. Thank you for being a team player for the World's #1 Beverage Company.

/s/_____ 11-7-01
Stephen Peters Date

Please sign and return to Human Resources for your file.

EXHIBIT B

Phoenix Coca-Cola Bottling Company
A COCA-COLA ENTERPRISES COMPANY

July 12, 2002

***Via Facsimile to* (505) 248-5239**

Geraldine Herrera
Federal Investigator
EEOC
Albuquerque District Office
505 Marquette, N.W., Suite 900
Albuquerque, NM 87102

Re: Stephen Peters v. Phoenix Coca-Cola Bottling Company EEOC Charge No. 390A20047

Dear Ms. Herrera:

In your final notice of Pre-Determination, dated June 19, 2002, you indicate that any material Respondent wishes to be considered should be submitted to you. Thank you for the opportunity to address the summary of information contained in your letter.

1. It is agreed that Mr. Peters is Black (African American) and a member of a protected class.

2. It is also agreed that Mr. Peters was qualified for his merchandiser position and his performance was satisfactory immediately prior to the events that resulted in his termination. He was not terminated on October 2, 2001 for unsatisfactory performance of his assigned job

duties, but rather due to his willful act of insubordination on September 30, 2001. His immediate replacement was Christopher Bolton.

3. Mr. Peters was terminated for his refusal to work a *scheduled* overtime day on Sunday, September 30, 2001. This was after his supervisor, District Sales Manager Cesar Grado, gave him a direct order to appear for his assigned shift and explained to Mr. Peters that failure to comply would be considered insubordination and would result in his termination. Respondent had every reason to believe that Mr. Peters understood this order.

   This direct order resulted from a report to Mr. Grado from Account Sales Representative Jeff Katt that Mr. Peters had told him that he did not intend to work on Sunday as *scheduled*. When Mr. Grado spoke with Mr. Peters on Friday, September 28, he simply said that "had other plans". When asked for a further explanation of why he did not plan to be at work, the Charging Party would not provide Mr. Grado with any specifics.

   On Sunday morning, Mr. Peters did not contact Mr. Grado prior to the beginning of his assigned shift. Instead, he contacted Mr. Katt to report that he was not coming to work since he was "sick".

   Mr. Peters had been specifically instructed to contact Mr. Grado at least a half-hour prior to the start of a scheduled shift if he was unable to report to work. Mr. Peters and the other merchandisers under Mr. Grado's supervision knew how to get in touch with Mr. Grado when they needed to. By purposefully not contacting Mr. Grado, Mr. Peters never gave him the opportunity to even consider his claim that morning that he was not able to

work due to illness. Perhaps Mr. Peters was concerned about how Mr. Grado would react after issuing a direct order to him and making it clear that non-compliance would result in his termination. Respondent's attendance policy states that misrepresenting a reason for absence is dishonesty and grounds for immediate termination. As a result of Mr. Peters' actions, Mr. Grado reached the reasonable conclusion that he had simply decided not to work as scheduled.

4. A review of the personnel files of Arturo Lopez and Damien Mirabal, both merchandisers who were also supervised by Mr. Grado, does not indicate that either employee ever engaged in conduct that was substantially similar to that exhibited by Mr. Peters on September 30, 2001. Specifically, to the best of Respondent's knowledge, neither employee has ever committed willful insubordination towards Mr. Grado or any other member of management. In the absence of such conduct neither employee should be considered a comparator to Mr. Peters for purposes of determining the existence of disparate treatment.

   Without evidence of treatment different than that received by other employees for substantially similar conduct, it should not be concluded that Mr. Peters was subjected to disparate treatment based upon his race. Mr. Peters was given a final warning by another Supervisor (not Mr. Grado) on September 17, 1999 for a similar work rule violation.

   Mr. Peters was told a week in advance that he would be scheduled an overtime day on the weekend of September 29-30, 2001. Mr. Grado actually gave Mr. Peters his preference as to what day he would prefer to be scheduled

and Mr. Peters selected Sunday, September 30. Mr. Peter's subsequent refusal to work on the day he selected was the direct basis for his termination.

The evidence clearly indicates that Respondent did not engage in disparate treatment or race discrimination in this matter. Mr. Peters alone determined the fate of his employment after being clearly apprised of what the consequences would be of his failure to follow the instruction of Mr. Grado.

The available evidence in this matter supports Respondent's conclusion that Mr. Peters violated an established rule sufficient to cause his termination. It is undisputed that Mr. Peters signed a copy of Respondent's Rules & Regulations, which also clearly state on the last paragraph of the front cover, *"management reserves the right to discipline according to the severity of the situation as deemed appropriate."*

Respondent requests that you review again carefully all of the documents previously provided and take this additional information into consideration before making a final Determination.

If you have questions, please contact me at (480) 345-3192.

Sincerely,

/s/ _____

Patricia K. Edgar
Employee Relations Manager
C: file
Attachment of Rules & Regulations on file with EEOC in this case

EXHIBIT E

CONFIDENTIAL EMPLOYEE
SUPPLEMENTAL DATA SHEET

TO BE COMPLETED BY NEW HIRES - RESUBMIT ONLY WHEN CHANGES OCCUR.

EMPLOYEE LAST NAME: Peters
FIRST NAME: Stephen
MIDDLE: B
SEX: M
DATE OF HIRE:
DATE OF BIRTH: 8/10/67
SOCIAL SECURITY NO.: XXX-XX-XXXX
WORK LOCATION:
JOB TITLE: CSA
EMPLOYEE NO.: 147213

LIST ALL DEPENDENTS - IF MORE ROOM IS NEEDED, LIST ADDITIONAL DEPENDENTS ON SEPARATE SHEET.

EMERGENCY NOTIFICATION DATA

NAME: Donald W. Peters
RELATIONSHIP: Father
ADDRESS: 208 Fentiman Pl.
CITY: Alb.
STATE: NM
ZIP CODE: 87105
TELEPHONE NO.: (505) 452-2593

EMPLOYEE DRIVER'S LICENSE DATA

STATE: New Mexico
EXPIR. DATE: 9/10/01
LICENSE NUMBER: 107715771
AFFIRMATIVE ACTION INFORMATION

The Company is required by Federal law to record and report affirmative action information regarding each employee. To assist us in this effort, please indicate below which group most correctly identifies you.

X Male

X Black

/s/_____
EMPLOYEE SIGNATURE

1/25/99
DATE

FOR HUMAN RESOURCES USE ONLY -

INPUT BY: BB
DATE: 2-18-99

CONFIDENTIAL EMPLOYEE
SUPPLEMENTAL DATA SHEET

EACH EMPLOYEE MUST COMPLETE AND RETURN BY MAY 1ST, 2000

EMPLOYEE LAST NAME: Peters
FIRST NAME: Stephen
MIDDLE: Brian
SEX: M
DATE OF HIRE: 5/95
DATE OF BIRTH: 8/10/67
SOCIAL SECURITY NO.: XXX-XX-XXXX
WORK LOCATION:
JOB TITLE: Merchandiser

LIST ALL DEPENDENTS – IF MORE ROOM IS NEEDED, LIST ADDITIONAL DEPENDENTS ON SEPARATE SHEET.

EMERGENCY NOTIFICATION DATA

NAME: Donald W. Peters
RELATIONSHIP: Father
ADDRESS: 208 Fentiman Pl.
CITY: Alb.
STATE: NM
ZIP CODE: 87105
TELEPHONE NO.: (505) 452-2593

EMPLOYEE EDUCATION LEVEL (PLEASE CHECK THE BOX THAT APPLIES TO YOUR SPECIFIC EDUCATIONAL HISTORY)

X HS DIPLOMA

NAME OF SCHOOL LAST ATTENDED: Octoraria
LAST YEAR ATTENDED: 1986

EMPLOYEE DRIVER'S LICENSE DATA

STATE: New Mexico
EXPIR. DATE: 9/10/02
LICENSE NUMBER: 107715771

ARE YOU CURRENTLY A MILITARY RESERVIST?

X NO

AFFIRMATIVE ACTION INFORMATION

The Company is required by Federal law to record and report affirmative action information regarding each employee. To assist us in this effort, please indicate below which group most correctly identifies you. Please check all that apply to you.

X Male

X Black

/s/ _____
EMPLOYEE SIGNATURE

4/24/00
DATE

EXHIBIT F

Phoenix Coca-Cola Bottling Company
A COCA-COLA ENTERPRISES COMPANY

April 24, 2002

Pat Trujillo, Federal Investigator
Equal Employment Opportunity Commission
505 Marquette N.W., Suite 900
Albuquerque, NM 87102

Re: Charge Number 390A20047 Stephen Peters

Federal Investigator Trujillo:

In response to your follow-up request for additional records, the following information is enclosed:

- Key for ethnic identification code
- Item 2 - Copy of Stephen Peters personnel file
- Item 3 - Current Albuquerque Employee Roll, pages 1 through 4
- item 8 - Copy of Arturo Lopez, Damien Mirabel and Kelly Sage personnel files
- Item 9 - Chris Bolton, individual who replaced Stephen Peters
- Item 10 - List of Merchandisers (point in time report 8/27/01) where Mr. Peters worked
- Item 11 - Merchandiser work schedule. Merchandisers were scheduled to work overtime days on regular scheduled days off in the following manner 1) by volunteer, 2) by rotation, 3) mandated.

- Item 12 - Cost Per Case Recap form, pages 1 through 60, 1/1/01 to present indicating work schedules, scheduled days off and days taken off.
- Item 13 - Also see Cost Per Case Recap for week ending 9/30/01 - DSM notes regarding need of scheduled coverage for route and Albertson's ad activity.
- Item 14 - District Sales Manager; Cesar Grado; and Account Managers' Ray Lucero and Jeff Katt carried out duties scheduled for Mr. Peters on September 30, 2001.
- Item 15 - termination records included in each personnel file (Item 2, Item 8).

If you have any questions, please call me at (480) 345-3192.

Sincerely,

/s/_____

Patricia K. Edgar
Employee Relations Manager

c: Dan Gilmore
File
Attachments

KEY ETHNIC ID

0 - CAUCASIAN
1 - BLACK
2 - ASIAN
3 - AMERICAN INDIAN
4 - HISPANIC

Current Albuquerque Employee Roll

Date: 04/24/2002

Loc: SPAAL

Complete name	Hire date	Position title	E ID	Grp
Blackman, Joel W	5/22/01	Intern Sales & Mktg	0	0
Dominguez, Frank L	3/05/85	Warehouse Supv (<5MM)	4	1
Graston, Jake H	8/30/00		0	
Baca, Karen M	6/18/00	Telemarketing Supv	4	
Lafferty, David A	7/17/95	Sr. Acctg. Mgr. (Albq)	0	
Bateluna, Donald R	8/23/79	Sales Manager	4	
Dodson, Robbin Dale	9/10/79	Sales Center Manager	0	
Schuler, Eva M	9/09/97	Office Supv	0	
Tollerud, Lori	7/17/95	Mgr Cold Drink Level	0	
Walter, William S	7/28/97	Market Level Mgr	0	

Complete name	Hire date	Position title	E ID	Grp
Mellen, Glen E	5/22/00	District Sales Mgr-Cold Drink	0	
Osborne, Terry A	9/27/99		0	
Waterman, Frederick V	3/17/97	District Sales Mgr	0	
Aranda, Martin R	8/15/94		4	
Grado, Cesar M	9/21/95		4	
Crowley, William B	6/03/95		0	
Swanson, Thomas E	1/09/02		0	
Connelly, Alberto J	6/01/68	Distribution Supv	4	
Gallegos, Ricky J	9/03/92		4	
Randazzo, Nicholas J	2/25/02		0	
Lucero, Jacob T	9/9/86		4	
Tanuz, Rory P	10/05/95		0	
Jury, Mitchell A	10/13/97	Distribution Mgr	0	
Potter, Jay H	4/02/98	Cooler Svc Supv	0	
Clifton, William	7/31/98		0	
Garcia, Rick J	10/30/00		4	
Johnson, Richard L	1/05/98		0	
Urrutia, Jorge A	3/23/92		4	
Jones, Shawn D	6/19/00	Cooler Svc Manager	0	
Pearson, Scott M	9/1/93	Area Manager	0	

Complete name	Hire date	Position title	E ID	Grp
Therrien, Jennifer L	10/30/00	Sr HR Administrator	0	2
Pedersen, Sherry L	1/04/00		0	
Stevens, Robert W	4/04/00	Sales Analyst Category Alb	0	
Zayas, Carlos M	11/02/98	Sales Analyst	4	
Young, Michael R	8/16/99	Inventory Control Analyst	0	
Collins, Diana J	1/02/90	Sr Telephone Sales Operator	0	4
Vigil, Amanda P	4/04/02		4	
Mora, Cordelia Y	10/11/95		4	
Montoya, Joanna M	11/04/97		4	
Wahlenmaier, Beth M	2/29/00	Sales Rep, 0 CD		
Narro, Martin E	1/19/95		4	
Olguin, Jeremy E	5/05/97		4	
Chavez, Marta Z	12/14/01		4	
Saavedra, April D	3/22/02		4	
Brown, Kelly K	3/22/02		0	
Mascarenas, Michael D	9/28/00		4	
Garcia, Leroy A	4/09/02		4	
Sopko, Rance D	6/14/99	Key Account Mgr	0	
Bauer, Amy P	2/10/97		0	

Complete name	Hire date	Position title	E ID	Grp
Endicott, James W	7/19/93	Channel Manager	0	
Varela, Danny A	10/04/99		4	
Griego, Gracie M	10/29/91	Account Manager	4	
Casados, Damian E	4/04/97		4	
Luna, Michael Z	8/02/94		4	
Trujillo, Amos S	7/14/94		4	
Lucero, Raymond A	6/24/98		4	
Katt, Jeff J	2/12/01		0	
McNutt, Jeffrey A	6/15/98		0	
Jacquez, Kenneth J	3/02/98		4	
Crespin, David A	2/26/98		4	
Kelly, Bobby I	7/15/99		1	
Henderson, Brian G	4/24/01		0	
Martinez, Sammy G	4/26/01		4	
Armijo, Tracee K	11/21/01		0	
Baca, Julian	12/01/94	Etail Space Rep	4	
Smith, Olesha D	2/05/01	Switchboard Receptionist	1	5
Eckstein, Judith L	3/01/01	Sr Executive Secretary	0	
Bloxham, Gail	2/25/02	Sr Clerk, Cooler Service	0	
Dueker, Linda L	11/23/87	Sr Accounting Clerk	0	

Complete name	Hire date	Position title	E ID	Grp
Trujillo, Elizabeth A	8/02/93	Lead Clerk Cooler Service	4	
Grange, Elizabeth G	6/6/94		4	
Santillanes, Suzanne C	11/21/00	Inventory Control Asst	4	
Hart, Kimberly S	5/30/01	Human Resources Clerk-Sr	0	
Smith, Michael D	10/27/97	Dispatcher	4	
Rios, Anthony F	11/17/00	Checker	4	
Zamora, William	11/21/00		4	
Ortega, Chris P	2/03/00		4	
Enright, David E	10/26/01		0	
Santillanes, Leo	9/26/00		4	
Mathias, Chris N	10/25/00		0	
Upshaw, Janet C	2/24/92	Cashier	0	
Gililland, Kevin L	9/23/85	Lead Fleet Mechanic	0	6
Aragon, Alex R	7/17/95	Cooler Svc Tech III	4	
Arient, Glenn M	7/11/00		0	
Moya, Mario D	10/25/00		4	
Payne, Kris M	2/29/00		4	
Sanchez Jr, Richard E	3/07/00		4	
Sanchez, Kevin E	9/10/99		4	
Ayala, Hector M	2/11/98		4	

Complete name	Hire date	Position title	E ID	Grp
Ortiz, Frank A	9/05/00		4	
Moya, Ricky J	7/09/01		4	
Casares, Erik A	9/04/01		4	
Campbell, Matthew S	3/27/02		0	
Ibarra, Fabian	4/01/02		4	
Rocco, Patrick L	4/11/00	Cooler Svc Tech II	4	
Gallegos, Paul J	3/24/97		4	
Whillans, David L	8/25/93		0	
Perez, Joseph O	4/20/98	Cooler Svc Tech I	4	
Aranda, Anthony M	6/15/95		4	
Esquibel, Michael	5/21/96		4	
Lucero, Joseph D	1/31/94		4	
Rex, Kevin E	4/27/95		0	
Urrutia, Angel A	5/23/94		4	
Woodhouse, Jamie J	8/15/94		0	
Sertich, Anton J	9/05/89	Bldg Maintenance Worker	0	
Lopez, Morris A	9/23/96		4	
Padilla, Eddie M	6/10/99	Transport Driver	4	7
Prieto, Jesus M	9/05/00	Special Events Driver	4	

Complete name	Hire date	Position title	E ID	Grp
Abeyta, John M	8/03/01	Premix/ Postmix Driver	4	
Torrez, Gene	5/30/00	Parts Expeditor	4	
Castaneda, Monico M	9/05/95	Full Svc Driver-Senior	4	
Munoz, Lorenzo	3/06/95		4	
Castaneda, Pedro	1/18/01		4	
Dumas, Andrew C	4/11/90	Full Svc Delivery Driver	0	
Goss, Herbert M	7/07/92		0	
Vera, Erich S	10/24/94		4	
Aragon, Raul B	8/12/94		4	
De Graaf, Harvey C	4/10/95		0	
Lucero, Ernest J	7/31/95		4	
Covarrubias, Juan M	6/10/96		4	
Berumen, Raul F	4/05/95		4	
Adams, Michael J	5/04/95		4	
Trujillo, Ron J	11/27/00		4	
Chavez, Ronny R	6/26/01		4	
Suazo, Edward G	8/09/78		4	
CDebaca Diego J	3/22/02	Delivery Merch-Relief	4	
Trujillo, Michael F	9/21/99		4	

Complete name	Hire date	Position title	E ID	Grp
Barba, Philip J	5/24/99	Delivery Merch Out Town	4	
Minge, Stan S	3/11/96		0	
Sanchez, Charles A	6/21/94		4	
Barela, Leroy G	7/21/94	Delivery Merch In Town	4	
McLeod, Kelvin L	8/14/98		4	
Castillo, Matthew C	1/17/95		4	
Clark, Daniel E	6/29/00		0	
Donaldson, Scott D	9/25/00		0	
Esquibel, Brian	3/03/98		4	
Gonzales, Alfred M	5/31/96		4	
Sanchez, Ted	11/25/97		4	
Valdez, Ruben E	10/10/95		4	
Vega, Marcos A	3/21/01		4	
Chavez, Dominic L	4/06/01		4	
Hadley, Monte H	5/07/01		0	
Miller, Kenneth W	7/02/01		0	
Suarez, David J	9/23/94	Bulk Merchandiser	4	
Noble, Ian S	11/18/98		0	
Salas, Steven J	10/19/00		4	
Vigil, Daniel J	8/22/00		4	
Trujillo, Christopher J	1/02/01		4	
Anaya, Dennis M	2/12/01		4	
Baca, Leonardo J	2/28/01		4	
Gallegos, Alfonso E	3/26/01		4	
Lucero, David B	3/26/01		4	
Maestas, Eric J	3/30/01		4	

Complete name	Hire date	Position title	E ID	Grp
Apodaca, David D	6/12/01		4	
Sullivan, Gregory E	7/09/01		0	
Villarreal, Luis R	7/23/01		4	
Lafaver, Barry D	9/10/01		0	
Ramirez, Eddie B	10/10/01		4	
Montoya, Jeffrey E	10/30/01		4	
Breitfeld, Wolfram H	12/14/01		0	
Martinez, Vincent P	9/17/01		4	
Apodaca, Phillip F	12/20/01		4	
Brown, Mark E	12/20/01		1	
Avery, Justin P	2/19/02		0	
Talavera, Jose L	4/01/02		4	
Gonzales, Miguel R	4/17/02		4	
Contreras, Raul F	4/19/02		4	
Carrillo, Jaime	4/23/02		4	
Telles, Andre E	4/23/02		4	
Holland, Christopher J	4/23/02		0	
Brey, William J	3/30/00		0	
Gallegos, James D	11/07/01		0	
Montoya, Matthew K	10/30/01		4	
Hernandez, Richard P	3/12/02		4	
Salas, Robert J	6/04/81	Bulk Driver	4	
Esquibel, Phillip E	7/29/87		4	
Montez, Omar I	10/01/91		4	
Sage, Oran K	5/04/93		0	
Isselhardt, Charles M	9/09/94		0	
Chavez, Christopher J	8/13/96		4	

Complete name	Hire date	Position title	E ID	Grp
Rael, James E	9/01/72		4	
Montoya, Tommy R	8/17/98	Warehouse Worker	4	8
Chavez, Ricardo D	10/02/91		4	
Ramos-Cabrera, Joel V	8/16/99		4	
Wills, Carl D	5/06/98		0	
Rael, James E	4/15/98		0	
Ruiz, Florencio C	1/10/92	Loader	4	
Turner, Kimberley R	11/08/94		0	
Haggerty, Wendell L	10/09/97		0	
Ruvalcaba, Jose G	5/14/98		4	
Zuniga, Jenner E	7/24/98		4	
Mendez, Rudy R	5/02/00		4	
Maldonado, Phillip A	6/21/01		4	
Carabajal, John G	7/18/01		4	
Sanchez, Rudy A	7/18/01		4	
Talamante, Patrick L	10/12/01		4	
Espinosa, Matthew	1/11/02		4	
Rivera, Placido D	1/30/02		4	
Martinez, Cruz M	3/22/02		4	
Yoe, Arminda J	4/04/02		4	

EXHIBIT H

EXCERPTS OF DEPOSITION OF SHERRY PEDERSON

[p.29]

A: This particular – actually, none of this [illegible] I go through, this exact program.
Q: Okay. When you're saying this, you're talking about the Management Essentials 1 training?
A: Yes, because I was not a manager or supervisor at the time.
Q: Okay. Since – at any time during your employment with BCI, have you attended any training that discussed a disciplinary interview?
A: I don't recall that specific term, no.
Q: Okay. Have you ever received any training that didn't – that discussed interviews or any kind of information with regards to discipline, even though it wasn't called a disciplinary interview, anything related to a disciplinary interview?
A: I don't recall any formalized program, no.
Q: Okay. Have you ever conducted a disciplinary interview?
A: The disciplines are given by supervisors so in 2000 and 2001 into 2002, I was not a supervisor, so through all that time, no, I did not.
Q: You did not conduct disciplinary interviews?
A: Correct.
Q: In 2001 and 2002?
A: Correct.

[p.30]

Q: Okay. Now –

A: Well, a portion of 2002.
Q: Okay. For the other portion of 2002 and and 2003, did you ever conduct any disciplinary interviews?
A: Yes, I did.
Q: Okay. Now, what is the purpose of a disciplinary interview?
A: The purpose I would say is to help the employee correct whatever issue they're having, whether it be performance or attendance, whatever the issue is to get them back on track so to speak.
Q: Okay. And you haven't received any – I just want to make sure I understand your testimony. For that portion of 2002 and 2003 that you were conducting disciplinary interview, have you ever received any training on how to conduct disciplinary interview?
A: The training I received is from going back to Pat and through her guidance and, possibly other people in the division office depending on what the issue is.
Q: But no formalized training?
A: I think that could be more valuable than formalized training.

[p.31]

Q: So that's a no?
A: Being guided for almost every issue, I think that's better.
Q: So that was a no, no formalized training?
A: No formalized training that I recall.
Q: We're almost done, Ms. Pederson. Let me ask you this: Knowing what you know now, what would you have done different with regards to Mr. Peters' termination?

MS. SHEA: I'm going to let her answer the question, but I'm going to object to it as being outside the scope of management training materials.

BY MS. MOLINA:

Q: Well, you, based on your training, you've gone through a lot of training, based on everything you know now, what would you have done differently?

A: I don't think I would have done anything differently to be honest, I really don't.

Q: Okay. Even based on the training that you've received in 2000, 2001, 2002, and 2003?

A: Yes.

Q: Okay. That's a yes, you would not have done anything differently?

A: Correct.

Q: I just want to make sure that I asked you

[p.32]

this. In 2001 you were not conducting exit interviews; is that correct? A: No, that's not correct.

Q: You did – I mean exit interviews for – with individuals who had been fired; is that correct?

A: I do not believe I did conduct any, no.

Q: How about in 2002?

A: No, I don't think so, no.

Q: 2003?

A: We're still talking about discharged people; correct?

Q: Yes, ma'am.

A: Not that I recall, no.

MS. MOLINA: Okay. I have nothing further. Thank you.

(Deposition was concluded at 1:05 p.m.)

* * *

[p.74]

I believe he was given advice by Pat Edgar.

Q. So it was advice by Ms. Edgar, or was it--
A. He was advised by Pat Edgar.
Q. So what was Mr. Grado's role in this -- he's getting advice or some -- or he's being advised to do something by Ms. Edgar. Is he the person who is simply relaying -- is he the messenger of information from Ms. Edgar?

MR. PRESNELL: Object to the form.

Q. (By Ms. Molina) I'm just trying to figure out, ma'am, what Mr. Grado's role was in relation to the advice from Ms. Edgar.
A. And I'm the one that's saying that she advised him. That was my thoughts on how it happened. You know, you would have to ask Pat whether it was actually advice or whether she actually told him --
Q. Okay. So does that --
A. -- what to do.
Q. So why did you put Cesar Grado here instead of Pat Edgar? Why didn't you put on this form --
A. Because Cesar Grado was the one who actually told him, so that's why I put Cesar's name

[p.75]

on there. Pat did not talk to Stephen Peters.
Q. I understood your earlier testimony that it was Pat's decision, Pat is the one who made the decision with regard to his termination; is that correct?
A. She made the decision to terminate, that's correct.
Q. And I'm going to go back and ask you, what about Mr. Peters conduct -- what was the conduct that was determined to be the insubordination that led to his discharge on October 2nd?

MR. PRESNELL: Object. She's answered that question. Why do we need her to answer it again?

MS. MOLINA: Because I don't recall.

MR. PRESNELL: Let's read the answer back.

MS. MOLINA: Counsel, I would prefer not to do that.

MR. PRESNELL: You prefer to repeat the questions?

MS. MOLINA: I would prefer not to do that because I am limited in time.

MR. PRESNELL: Then we won't count that towards your time.

MS. MOLINA: Okay, then we will go off the

[p.76]

record.

(Off the record from 11:44 to 11:47.)

(The record was read as requested.)

Q. (By Ms. Molina) Which act that -- you just heard your prior testimony. What specifically of that conversation was the act of insubordination that whole answer that you just heard?

A. To narrow it down even more, it would be after Cesar Grado explained that refusing to work would be considered insubordination and he would be terminated for that. And when -- you know, after that, he still was refusing to work.

Q. So the act of insubordination that caused his -- or that ended up supporting his dismissal, his firing, was that conversation with Mr. Grado, you understand it?

A. Yes.

Q. And that conversation was on Friday, 9/28/01; is that correct?

A: Yes.

Q. Let's go back to Exhibit N. These may have been the -- these documents were provided to the EEOC recently. These are marked BCI00191, 192, 194, 195. Do you see that?

A. Yes.

[p.77]

Q. And this is all part of Exhibit N. Were you the person who gathered these documents to provide -- or provided the copies of these documents so that BCI could provide them to the EEOC?
A. Probably.
Q. Okay. Would there be anybody else but you who would have done that?
A. Probably not, no.
Q. Okay. Do you know why this -- the DSN on document 191 and 192, the EEOC was provided with a copy of that DSN during the administrative investigation?
A. Um-hum.
Q. This one over here, BCI 194 and 195, the EEOC was not provided a copy of that DSN with regard to Stephen Peters. Do you know why, first of all, there are these two DSNs? One seems to be incomplete and one seems to be more completed, and they're in different handwritings. And DSN, 191 and 192, appears to have more information on the second page. Do you know why there are two sets of the same DSN, at least as to the same event?
A. No. I was not even employed at that time, so I have no idea.
Q. Okay. Let's go back to the DSN for

[p.78]

Mr. Peters' Exhibit N. Were you present when this DSN was given to Mr. Peters?
A. Yes, I was.
Q. Okay. And that was October 2nd, 2001; is that correct?
A. Correct.
Q. Okay. Who else, besides yourself, was present at the time that Mr. Peters was presented with this DSN?

A. The additional people that signed this, Stephen Peters, Cesar Grado, and Don Bateluna.
Q. Anybody also?
A. No.
Q. Tell me what happened during this meeting, this occasion when he was -- when Mr. Peters was presented with this DSN.
A. What I recall is that Cesar Grado explained -- you know, went through the Disciplinary Status Notice, read that to him, and asked him if he had any questions or comments. And the only thing I remember -- I don't remember any other specific comments, except that I believe he said something to the effect of, you know, we'll hear from his lawyer, or he was going to get a lawyer, or something about a lawyer. And you know, he put, "I do not agree,"

[p.79]

on the form. And then he walked out.
Q. He, Mr. Peters?
A. Mr. Peters walked out.
Q. And he's the one who put on the form, "I do not agree"?
A. Yes.
Q. During the time that Mr. Peters -- let me go back and ask you some follow-up questions.

Mr. Grado explained the DSN or he read the DSN?
A. He read it.
Q. So when you say, "explained," you mean he read?
A. He read, yes.
Q. Okay. Did you have any questions, comments or any input during this time, this meeting with Mr. Peters?
A. No.
Q. Did anybody, Ms. Edgar or Mr. Bateluna?
A. Pat Edgar was not there.
Q. Oh, I'm sorry. Okay. Did Mr. Bateluna?

A Not that I recall, no.
Q. Okay. What happened after Mr. Peters left, with regard to Mr. Peters and what had just happened?

[p.80]

A. Could you be more specific? I mean, do you mean when did he come back for his paycheck? I'm not sure what you're asking.
Q. Okay. I will re-ask it or restate it. After Mr. Peters left the meeting, when he was fired, remaining in the room were yourself; is that correct --
A. Um-hum.
Q. -- and Mr. Bateluna and Mr. Grado; is that correct?
A. Correct.
Q. So the three of you remained in the room --
A. Yes.
Q. -- in your office. Do you know how long you stayed in your office?
A. I really don't recall.
Q. Okay.
A. It wasn't long.
Q. Okay. Was there any conversation or discussion or comment made by anyone after Mr. Peters left the office?
A. I don't recall any specific comments.
Q. Okay. You made reference to Mr. Peters indicated on the DSN that he did not agree; is that

[p.81]

correct?
A. (Witness nods head.)
Q. Is that a yes?
A. Yes.

Q. Did anyone follow up with Mr. Peters as to why he indicated on this form that he did not agree?
A. No, because he left -- he got up, he wrote something down. I didn't realize what he wrote until after he walked out, and he left.
Q. Okay. After he left, did anybody make any inquiry concerning his statement that he did not agree?
A. No.
Q. Did you speak to any witness after learning of what was going on with Mr. Peters and Mr. Grado and the work schedule for the weekend, did you speak to anyone other than Mr. Grado and Ms. Edgar? Did you speak to anybody or interview anybody?
A. No.
Q. Okay. Did you speak to Mr. Peters prior to his termination?
A. No.
Q. How many people -- during your time with Coca-Cola, in your approximately four years, how

* * *

[p 142]

kept?
A. They are not to be kept.
Q. Why is that?
A. Because it's confidential information on an employee, so we would not want to keep something laying around --
Q. So what happens --
A. -- that is not part of their record.
Q. So what happens to those drafts?
A. I would only make an assumption that they are destroyed.

Q. Let me ask you if you recognize the handwriting on this part of the exhibit, and I'm asking you about page 206 of Exhibit E.
A. Yes, that is my handwriting.
Q. Your handwriting, okay. Is it your handwriting -- does your handwriting appear on the entire document, with the exception of the two signatures that are not your signatures at the bottom of the first page?
A. Yes, it is.
Q. Okay. So who dismissed -- who fired Mr. Ulibarri?
A. I made the decision, and Cesar actually carried it out. You know, I have to correct myself

[p.143]

on that. I believe Pat Edgar may have made the decision, but this is my writing on the form.
Q. So the decisions as to discipline to be imposed on employees is made by somebody in Human Resources; is that correct?
A. Yes.
Q. Okay. And the decision is carried out by the employee's manager; is that correct?
A. That's correct.
Q. Is the employee told who the decision maker was with regard to the discipline imposed?
A. I don't know. I don't know if it was verbalized.
Q. Just generally in this process of HR making the decisions with no recommendations from supervisors on discipline and HR making the decisions that are carried out by the manager, how would an employee know that the manager is simply the messenger, that the decision maker is somebody else?
A. I think many times they are told, but I can't say that in every case that it is verbalized to them.

Q. Why is that information not on the DSNs? The information I'm referring to is, decision to

[p.144]

terminate was made by, and then provide the person's name, why is that information not on the DSN?
A. I can't answer that. I don't know.
Q. Why is the information on the DSN not -- why does the DSN not show who is imposing discipline, short of termination, for example, probation or suspension, why is that information not on the DSN?
A. I don't know.
Q. As an HR -- Senior HR -- and now you hold even a higher management position; is that correct?
A. Yes.
Q. Would it be -- would you agree that it would be confusing to an employee to look at the DSN and not see who the actual decision maker -- because it's not on there, who the actual decision maker is with regard to a particular disciplinary action taken against that employee?
MR. PRESNELL: Object to the form.
A. The reason why we're making the decisions -- I say, we -- why HR is making the decisions is to be fair and consistent with the employees. I think it would be more confusing if it was down there. They may misinterpret that and think that they report to HR. That is my opinion.

[p.145]

Q. And in keeping, with your opinion, isn't it -- wouldn't it be fair to tell the employee, that these DSN forms -- that the person who is responsible for discipline is Sherry Pederson, Patricia Edgar, whoever it is from HR? Isn't that fair to the

employee, that the employee know who's the one who is firing me or who is the one who is putting me on probation?
A. I don't have any opinion on that.
Q. Let's go back to Exhibit J. I have it right here. I'll take those exhibits back.

MR. PRESNELL: Did you say Exhibit J?

MS. MOLINA: Oh, H. Thank you, Todd.

Q. (By Ms. Molina) Let's go to the second page of this exhibit. We've already looked at it earlier.
A. Yes.
Q. Other than Group A, Number 5 being titled, "Insubordination," how is an employee -- how does an employee know what kinds of conduct may lead to insubordination by looking at this? If an employee looks at this Group A, how would an employee know what insubordination is?
A. When the supervisor tells them. I mean if there's something that they did and they're told,

* * *

EXHIBIT I

New Mexico Department of
LABOR
P.O. Box 1728
Albuquerque, New Mexico 87103
Fax (505) 841-8636

EMPLOYER'S STATEMENT

This individual has filed a claim for unemployment compensation benefits and named you as the last employer. Please review the reason for separation given. Complete this form and return it to: NM Department of Labor, P.O. Box 1728, Albuquerque, NM 87103. Failure to respond within 10 calendar days from the date of this notice shall be deemed an irrevocable waiver of your rights to be heard before a determination is made and your account may be liable for benefit changes.

IF SEPARATION WAS FOR LACK OF WORK, THIS NOTICE IS OUR DETERMINATION. YOUR ACCOUNT WILL BE CHARGED FOR ANY BENEFITS PAID BASED ON THIS PERIOD OF WORK. THE DETERMINATION WILL BECOME FINAL UNLESS AN APPEAL IS FILED WITHIN 15 DAYS FROM THE DATE OF THIS NOTICE/DETERMINATION WAS MAILED.

Claimant's Name: Stephen Peters
Social Security Number: XXX-XX-XXXX
THE INDIVIDUAL'S FIRST DAY OF WORK WAS: 5/3/95
LAST DAY OF WORD WAS: 10/2/01

WHO WAS THE CLAIMANT'S IMMEDIATE SUPERVISOR? Cesar Grado

REASON FOR SEPARATION: FIRED

GIVE FULL DETAILS FOR SEPARATION: Insubordination – Stephen was given a directive on 9/28 to report to work on Sunday, 9/30. Stephen said he had other plans. Stephen was told by Cesar Grado that if he didn't show up, it would be considered insubordination.

IF FIRED, WHAT WAS THE FINAL INCIDENT THAT CAUSED THE DISCHARGE? Stephen did not show up for work on 9/30.

IF THE CLAIMANT WAS DISCHARGED, WAS HE/SHE WARNED? YES

IF YES, WHEN AND HOW (SUBMIT PROOF OF WARNINGS): 2-day disciplinary suspension on for insubordination on 9/21/99. Refused to word on a weekend.

DOES THIS INDIVIDUAL HAVE A DEFINITE RETURN TO WORK DATE? NO

IF YES, WILL THIS INDIVIDUAL RECEIVE VACATION PAY FOR ALL OR PART OF THIS PERIOD? NO

UPON SEPARATION, THIS INDIVIDUAL WAS OR WILL BE PAID HOLIDAY PAY OR WAGES IN LIEU OF NOTICE: NO

I CERTIFY THE INFORMATION FURNISHED IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF. I UNDERSTAND THAT APPLICABLE LAWS PROVIDE PENALTIES FOR FALSE INFORMATION.

/s/_____
Sherry Pedersen - Sr. HR Administrator
Signature & Title

Date 10/10/01

DOCUMENTS ATTACHED: YES

IF YES, LIST DOCUMENTS: Discipline - 9/21/99 & Discharge 10/2/01

NAME OF COMPANY: Coca-Cola Bottling Co. of Albuquerque

ADDRESS: 7901 Los Volcanes, NW, Albuquerque, NM 87121

PHONE: 505-352-3279

EXHIBIT J

Phoenix Coca-Cola Bottling Company

November 15, 2001

Pat Trujillo, Federal Investigator
Equal Employment Opportunity Commission
505 Marquette N.W., Suite 900
Albuquerque, NM 87102

Re: Charge Number 390A20047 Stephen Peters

Federal Investigator Trujillo:

Please find following the response of Coca-Cola, Dr Pepper Bottling Company of Albuquerque, 7901 Los Volcanes Road N.W., Albuquerque, NM 87121 to the Charge of Discrimination filed by Stephen Peters, a former employee of the Company. If you have any questions, please contact me at (480) 345-3192 in our Phoenix Division office.

The Company hired Stephen Peters on May 3, 1995. He was a Merchandiser when his employment was terminated on October 2, 2001 for insubordination.

Merchandiser's fill shelves, coolers, venders' displays with Coca-Cola products; face, rotate, remove out of code products; condense back room and work load (organize and put away); work closely with Account Manager or other team members to ensure that maximum sales are attained; clean (dust) shelves' backroom; build & move displays, etc. They work overtime as required to maintain business demands - this includes an overtime day on a regular scheduled day off. Weekends and holidays are very demanding with customer

service in our industry. This job demand is understood as a requirement of the job.

On a frequent basis trying to schedule Mr. Peters in on a regular scheduled day off was "like pulling teeth" according to his Supervisor, Cesar Grado. Mr. Grado held back from forcing Mr. Peters to work as needed on his scheduled days off as Mr. Peters was in constant pushback from working over a weekend. However, business demands that could not be ignored made it necessary to force Mr. Peters in on the date in question. On September 28, 2001, Mr. Peters was given a direct order to come in to work on Sunday, September 30, 2001 due to business necessity. His District Sales Manager, Cesar Grado, explained to Mr. Peters that this was a direct order and failure to comply would be considered insubordination and would result in his termination. Disciplinary discharge paperwork attached.

Mr. Peters told Mr. Grado on September 28, 2001 that he had plans and to do whatever he had to do. Mr. Peters then called in "sick" on Sunday, September 30, 2001. Mr. Peters told Mr. Grado and the local HR Administrator, Sherry Pedersen, in a meeting that he had a doctor's note, but he did not provide one.

Mr. Peters received a disciplinary suspension in September 1999 for insubordination and given a final warning. At that time, it was made very clear to Mr. Peters that he is required to work overtime as scheduled even on his normally scheduled days off based on business necessity. Our business depends on every day customer demands that include weekends (or normally scheduled days off) and holiday service. 1999 disciplinary paperwork attached.

Race was not a factor in our decision to terminate Mr. Peters.

Sincerely,

/s/_____
Patricia K. Edgar
Employee Relations Manager

EXHIBIT K

EXCERPTS OF DEPOSITION OF PATRICIA K. EDGAR

[p.74]

a final warning?

A. No.
Q. Okay.
A. Not that I recall.
Q. And it goes on further to say, "At that time it was made very clear to Mr. Peters that he is required to work overtime as scheduled even on his normally scheduled days off based on business necessity. Our business depends on everyday customer demands."

So that statement -- you're talking about the 1999 incident in that paragraph?
A. Yes.
Q. Okay. So the same questions: When you say at that time it was made very clear to Mr. Peters, you didn't ask Mr. Peters if it was made very clear to him?
A. No.
Q. And you didn't ask Esquibel, Brawley, Matthews, Donnelly if it was made very clear to him?
A. I may have had a conversation with Irene.
Q. Before you prepared the EEOC response.
A. I don't recall, but she was my director.
Q. So are you saying that there's a possibility you spoke to Irene Brawley in

[p.75]

preparation of the EEOC Position Statement to verify whether this 1999 write-up --
A. Maybe not to verify this, but that -- I think I might have had knowledge that that did occur.
Q. But you're not too sure?
A. To the best of my recollection.
Q. Okay. Okay. The last paragraph, "Race was not a factor in our decision to terminate to Mr. Peters." Who is the "our" in that sentence?
A. Probably the company.
Q. Probably?
A. Well, our decision.
Q. Whose decision?
A. The company.
Q. Who in management?
A. It's a figure of speech.
Q. Okay. Would you look at -- I'm going to take this one. Would you look at this exhibit, please? We're on Exhibit W. So this is a second response that you prepared to Mr. Trujillo of the EEOC--
A. This is the Attendance Policy.
Q. Oh. I'm sorry.
A. That's okay.

[p.76]

Q. There we go. Exhibit U.
A. Okay. Thank you.
Q. This is a response to a second request for information by Mr. Trujillo; is that correct?
A. Yes.
Q. Would you look specifically to item 11 in your letter?
A. Okay.

Q. "Merchandiser work schedule." You say, "Merchandisers were scheduled to work overtime days on regular scheduled days off in the following manner: 1) by volunteer; 2) by rotation; 3) mandated."
A. Right.
Q. What did you mean by that, volunteer, rotation or mandated?
A. That's what Cesar had told me, that first he asked for volunteers that would want overtime. Sometimes he would rotate to be -- out of a sense of fairness, if there was a lot of overtime, that everybody would take their turn, and that sometimes he told people that they needed to work and they worked.
Q. Okay. So he got to the point where he told people that they needed to work after he had

[p.77]

asked for volunteers or had gone through a rotation?
MR. PRESNELL: Object to the form.
A. Repeat the question.
Q. (By Ms. Molina) Okay. This whole scheduling of the merchandisers would start by he would first ask for volunteers?
A. That's what he told me, yes.
Q. Okay. And then if there weren't any volunteers, then he would go to a rotation system?
A. That was my understanding, that that was how he took care of his business. First, by volunteers, then by rotation, so that everybody had to do whatever, that somebody wasn't continually being the only one that had to work and then to -- if you have to work, you have to work. There's nobody else.
Q. Okay. So are the people in the rotation, are those volunteers? If he has more people that he needs because many have volunteered, then he goes to a rotation so that it's fair?

A. I think that's how he made his decision to balance out if there were people that necessarily didn't want to volunteer, that he would balance it out by having a rotation system where everybody got some overtime.

* * *

[p.82]

told you or wherever you tried to find out if Mr. Grado had tried to make arrangement for the schedule on Sunday?
A. Say it one more time.
Q. Yeah, whether Mr. Grado had made any arrangements to cover the schedule on Sunday?
A. I don't have any knowledge about that.
Q. Did you ask Mr. Grado?
A. When?
Q. At any time.
A. I guess I don't understand your question. In regards to what?
Q. To Mr. Peters being terminated from his job.
A. At the time or here or --
Q. Yes.
A. When are you talking?
Q. Okay. Let's get away from this document.
A. Okay.
Q. At the time that it happened, at the time that -- from September 27th, 28th, to October the 2nd, do you know whether Mr. Grado, during that time period, had made any other arrangements to cover the schedule -- to cover the shift that Mr. Peters was to work on that Sunday?

[p.83]

No' I don't.

Q. Did you ask him if he had made arrangements?
A. They probably would -- our business is very reactionary to customer demand and everything else. It probably would depend on who was there, who wasn't there. And Mr. Grado, himself, probably even thought that there might be a chance he would have to work. So I -- but I don't remember specifically asking him, no. But that's the nature of our business. It changes all the time.
Q. So the business necessity that existed on Friday may not have been existing on that Sunday is what you're saying?
MR. PRESNELL: Object to the form.
Q. (By Ms. Molina) Okay. When on that Monday, there was that conversation about whether Mr. Peters -- whether Mr. Grado had heard from Peters, do you recall that?
A. Yes.
Q. Okay. That's when you asked him if he had heard from Mr. Peters?
A. Right.
Q. Okay. He asks if he had heard from Stephen Peters on Friday, I believe was the

[p.84]

testimony.
A. Right.
Q. And he hadn't heard from him; is that right?
A. That's my recollection, yes.
Q. Why would Grado be expecting to hear from Peters if Peters had made it clear on Friday that he wasn't going to work on Sunday?
A. I felt that it was an ongoing reflection of insubordination from what happened on Friday for Mr. Peters not to contact Mr. Grado regarding what happened on Friday.
Q. Okay. So Mr. Peters was -- okay.
MR. PRESNELL: Wait, wait.

Q. (By Ms. Molina) Go ahead.
A. He was insubordinate on Friday. The action was carried out -- or part two was he didn't show up, and part three of it is that he didn't bother to call. He continued that.
Q. So three parts -- three different incidents?
A. Well, to explain it to you now.
Q. Okay.
A. Yeah.
Q. Okay. So in looking back, he could have

[p.85]

been written up three times for insubordination?
A. No, I'm not saying that.
Q. So there were three parts to his one incident of insubordination?

MR. PRESNELL: Object to the form.

A. I'm saying there were considerations in my mind that added to this, to him not calling.
Q. (By Ms. Molina) Okay. That's fine. The third paragraph on the second page of Exhibit V, your PDI response letter, second page, third paragraph.
A. Okay.

MR. PRESNELL: Her what letter?

MS. MOLINA: PDI, predetermination interview and letter.

Q. (By Ms. Molina) "Mr. Peters had been specifically instructed to contact Mr. Grado at least a half hour prior to the start of a scheduled shift if he was unable to report to work." Do you see that?
A. Yes, I do.
Q. Okay. How do you know that Mr. Peters had been specifically instructed by Grado to contact him?
A. Because that's what Mr. Grado instructs

* * *

[p.134]

off to the supervisor, but Ralph said pretty much the same thing and only got suspended for five days. Why? Do you see that?
A: Yes.
Q: So that is an example of what you consider to be discrimination; is that correct?
A: It could be, yes.
Q: Okay. And why is that? Why did you include that as something that could be discrimination?
A: Because you want to -- you don't want unexplained inconsistencies, but every situation has its own merits, so it would be a discussion with the supervisors on letting them see that it's important to be consistent.
Q: And you don't want unexplained inconsistencies because that's discrimination; is that correct?
A: It could be.
Q: Would you turn to page 277. Was this another slide that you presented to the managers and supervisors in attendance?
A: Yes.
Q: And this one, the slide reads "Reviewing the Supervisors Role"; is that correct?

[p.135]

A: That is correct.
Q: Okay. Now, what is this? What was your purpose in providing this information to the attendees?
A: What was the purpose?
Q: Yes, ma'am.
A: To discuss with them from a training aspect what their role is with regards to employees.

Q: Their role being the manager's role with regard to employees; is that right?
A: Any supervisor's role.
Q: Including Cesar Grado's role?
A: Yes, he was a supervisor.
Q: Now, would you look at the section -- or at the second point in your slide reads, "applying work rules consistently", do you see that?
A: Yes.
Q: What were you referring to with regards to that topic?
A: Being consistent.
Q: In what?
A: In applying work rules.
Q: What work rules?
A: Employee rules and regulations.
Q: Such as?

[p.136]

A: Well, our employee rules and regulations say that every matter the company reserves the right to consider individual circumstances based on their own merit, go with rules and regs. And there are group A, group B, group C rules. Some of them are progressive in nature, some of them aren't. Some of them would be -- could be immediate dismissal. So it's important to know what the policies, procedures, work rules are, and to look at applying them consistently.
Q: What do you mean by applying them?
A: Decisions that are made, accountabilities.
Q: What do you mean decisions that are made?
A: I don't understand your question, what do you mean? I'm not sure I know what you want. Decisions that are made that have to do with being at work.
Q: You mentioned discipline in three groups A, B, and C; is that right?

A: Yeah, work rules.
Q: Work rules. And those work rules have to do with discipline; isn't that right?
A: They have to do with -- they would have to do with discipline if someone were out of the guidelines and discipline were applied.
Q: And in providing this training to

[p.137]

supervisors including Cesar Grado, he refused training on how to apply work rules consistently; is that correct?
A: Well, on this slide as a training guide, it was part of saying to them, to all supervisors and managers that it would -- it would be their role to apply workplace rules consistently.
Q: And workplace rules include rules having to do with discipline; isn't that right?
A: Well, like I -- yes, the rules and regs say they don't cover every conceivable situation and that's why it's deemed -- that's why you have to look at everything based on its own merits.
Q: So what is the -- what was the purpose of providing supervisors and managers, including Cesar Grado, training on how to apply work rules consistently?
A: What was the purpose?
Q: What was the purpose?
A: To help them grow in their roles. That's what training is about, is helping develop people and opening up discussion.
Q: Because that's part of their responsibility; isn't that right?
A: It's part of their responsibility to -- they

* * *

[p.142]

A: Yes.
Q: Okay. What did you do to investigate?
A: Pulled the personnel file.
Q: What else did you do to investigate?
A: I had firsthand observation or information from the supervisor.
Q: When you say you pulled the personnel file, you were in Phoenix; is that correct? Weren't you in Phoenix?
A: Yes.
Q: So did you have Mr. Peters' file here in Phoenix?
A: No. I had -- I asked Sherry Pederson to pull the file.
Q: So you did not pull the personnel file?
A: No, I meant asked to have the personnel file to see what was in it. That's what I meant.
Q: What else did you do?
A: Other than talking to Cesar and Sherry and looking at the -- and having her tell me what was in the personnel file, that's it.
Q: Is that something you would tell participants in your training sessions, would that be an example of a careful, thorough, objective investigation?

[p.143]

A: Yes, if you had firsthand observation from the supervisor just like this says.
Q: And you were satisfied with what you had?
A: We rely on our supervisors to uphold the rules and regs and so forth, and yes, we had firsthand information from the supervisor that said this is -- and very compelling to me.
Q: Turn to page 281. What is this, "Supervisor's EEO Checklist"?

A: I think it's training materials to open supervisors' eyes as far as, again, getting all the facts and so forth.
Q: Does this include a check -- is this a checklist for managers or supervisors who are going to take any action with regards to an employee's employment?
A: I think it's a guideline that supervisors can use in getting information prior to contacting HR. It makes our job a lot easier if they know what's going to be required.
Q: Okay. Look at number one.
A: Okay.
Q: This checklist for supervisors says, "Do I have all the facts from all sides before acting?" Do you see that?

[p.144]

A: Yes, I see that.
Q: Did you do anything to find out from Mr. Grado if he had all the facts from all sides before acting, meaning calling you?
A: Did I ask Mr. Grado that?
Q: Yes.
A: I remember questioning him. I don't know if I specifically quoted this line, but we certainly had a discussion about the facts of the case, yes.
Q: Did you have the facts from all sides before making a decision with regards to Mr. Peters?
A: I felt I had sufficient facts to make a decision.
Q: Did you have the facts from all sides before you made a decision with regards to Mr. Peters?

MS. SHEA: Objection, asked and answered.

THE WITNESS: I'm not sure what --

BY MS. MOLINA:

Q: You had information from one side, Cesar Grado; isn't that correct?

MS. SHEA: Objection to the form of the question.

THE WITNESS: That's not correct.

BY MS. MOLINA:

[p.145]

Q: Oh, then what other side did you have?
A: I had past history from the personnel file of a very similar incident with a different DSM that added to Cesar Grado's firsthand observation or interaction with Mr. Peters. It confirmed it.
Q: And this is the incident -- well, what did you know about this previous incident?
A: The personnel file said that he was -- I believe it was a disciplinary suspension, or a final warning that any other behavior such as that would result in his termination.
Q: Did you confirm that Mr. Peters had been made aware of that warning?
A: I'm not sure I know what you mean by that. It was documentation in the file.
Q: Did you confirm whether Mr. Peters had been -- was aware of that final warning?
A: Confirm with who?
Q: With Ms. Pederson, the person that is giving you the information?
A: Did I confirm with her?
Q: Yes, ma'am.
A: I trusted the information.
Q: So that's a no?
A: I'm not sure I understand your question. I

[p.146]

asked her to pull the file and share with me what was in the file. She did. I don't remember if I specifically asked her if I could trust the information.

Q: Did you specifically ask her whether there was any indication on the document that Mr. Peters had received the final warning?
A: I don't even know if I asked her that specifically. It was an -- it was my understanding that he had been given the warning.

MS. SHEA: Objection. Ms. Molina, could you explain what this has to do with the training materials? We're going back into the same subject matter that's been explored in depth in the prior deposition.

MS. MOLINA: This is - I'm going off the supervisor's EEO Checklist that was provided, again, two days before the discovery deadline. And according to this checklist, Ms. Edgar provides this training to supervisors, and the checklist says that she - there are certain things that are expected of supervisors with regards to employees.

THE WITNESS: It's guidelines, yes, training guidelines.

BY MS. MOLINA:

[p.147]

Q: All right. Training guidelines?
A: That's what it is.

MS. MOLINA: Okay. So it is absolutely permissible for me to ask this witness about her role and these training materials and Mr. Peters' claim. I don't see how I cannot ask her about this, her role again and the training materials as it pertains to Mr. Peters.

MS. SHEA: I agree but I think some of the questions are getting -- there is a disconnect between the training materials and what you're asking, if you're going back and asking what she said to different people at different times

during that time period. These questions have already been asked and I don't see how the answers -- the question/answer is effected by the training materials.

MS. MOLINA: They are proper follow up, Ms. Shea. And to the extent I can, I'm trying to stay as close as I can to these materials.

MS. SHEA: I'm not saying you can't do that. And I don't want to, you know, cause an unnecessary delay or problem here.

MOLINA: Okay.

BY MS. MOLINA:

Q: Now, back to number one, reads, "Do I have

[p.148]

all the facts from all sides before acting." So with regards to Mr. Peters' claim, you had -- you had talked to Cesar Grado on the phone; is that correct?

A: Yes.

Q: And then you asked Ms. Pederson to pull Mr. Peters personnel file; is that correct?

A: Yes.

Q: Anything else with regards to obtaining facts from all sides before acting with regards to this number one in this checklist, anything else that you did?

A: There are no other individuals that I talked to.

Q: And you didn't talk to Mr. Peters?

A: No.

Q: Number two reads, "Have I reviewed applicable company policies and practices?" Do you see that?

A: Yes.

Q: Did you do that?

A: Did I do that?

Q: Yes, ma'am.

A: Yes.

Q: With regards to Mr. Peters, termination?
A: Yes.

[p.149]

Q: Okay. Which company policies and practices did you review?
A: The rules and regs.
Q: Which ones?
A: There's only one set.
Q: Which ones are those?
A: The employee rules and regs. You mean which violation?
Q: Which particular rule and reg did you look at?
A: Insubordination.
Q: And when you say insubordination, you're talking about the list of group A violation -- group A violation that lists insubordination as a violation; is that correct?
A: I think it's A(1), yes.
Q: Okay. There's nothing else other than that, those materials that discuss insubordination, is that correct, as far as the rules and regulations?
A: I'm sorry. You'll have to ask me again.
Q: Yeah, that's not -- I'll rephrase. Other than looking at the rules and regulations that talk about insubordination, did you look at anything else?
A: I looked at the rules and regs as a whole. When somebody is telling me a situation, I listen to

* * *

[p.178]

materials?
A: There were materials and when I was -- when information was requested, I provided what I had in my system still, in my computer.

Q: Where are the additional materials at?
A: They weren't in my system.
Q: Where are they at?
A: I don't know. I'd have to look.
Q: So there are?
A: There could be, yes, there could be training materials.
Q: For 2001?
A: Yes.
Q: Okay. But you don't know where those are at?
A: Not off the top of my head right now.
Q: And I'm not asking you to tell me what you discussed with counsel, and I'm asking -- I'm not asking her to waive any confidentiality or privilege or anything, but when you were asked to provide the materials, what were you asked to provide?
A: Any training materials that I had.
Q: And you knew that those training materials existed in -- at least for this 2001 training session and you didn't provide those to counsel; is that

[p.179]

right?
A: I provided what I had.
Q: Off of your computer?
A: Right.
Q: So --
A: In looking for what I had, I provided everything that I had.
Q: Off of your computer or that you had in your computer?
A: Well, everywhere, but the computer is where this stuff was, was in my computer.
Q: Okay. So do you have -- do you have 2001 materials that you used to put this presentation on employee administration?
A: I don't.

Q: Who does?

A: I'd have to -- I don't know. I'd have to look. I'd have to see if I could locate it. I looked for everything that I could find and I sent it. It did exist.

MS. SHEA: Do you know for a fact that it still exists now?

THE WITNESS: I don't know for a fact if it still exists now.

BY MS. MOLINA:

[p.180]

Q: And you can't tell me who attended this particular training?
A: Yes, it was all the HR admins from like Gallup, Albuquerque. Albuquerque we had the office manager attend; Roswell, Alamogordo, Hobbs, Clovis, Tucson, Cochise, Yuma, Prescott. We had all the 171 admins come in.
Q: Does that include -- would that have included Sherry Pederson?
A: It would have but I don't think she attended this.
Q: Why do you not think she attended this?
A: I think she was gone. That's why Eva attended, Eva Schuler.
Q: Gone where?
A: I think she was on vacation or something.
Q: She wasn't available to attend the meeting pal is what you're saying?
A: Yeah' that's my recollection.
Q: And you don't have a sign-in sheet as to who attended?
A: No. I provided what I had.
Q: Do you know whether Don Bateluna attended the training?
A: No' just admins.

[p.181]

Q: Just admins?
A: Clerks.
Q: What do you mean clerks?
A: Senior clerks, some of them are called lead clerks some of them might be at an office manager level. Office manager meaning manages the office, but they are support people.
Q: Support staff?
A: Yes, ma'am.
Q: Okay. Why would Sherry Pederson be attending this meeting for support staff personnel?
A: Because at the time she was an administrator, an admin person.
Q: So at the time she was not a supervisor?
A: No.
Q: This is 2001?
A: Right.
Q: Was she a manager in 2001?
A: No.
Q: So she was support staff?
A: She was an admin, yeah, admin.
Q: Then in 2001 did support staff have authority to fire employees?
A: As a senior HR, no, she wouldn't fire people.

[p.182]

Q: Did she have -- as a support staff admin person 2001, did Sherry Pederson have the authority to impose discipline on employees in Albuquerque?
A: Yes, as a senior HR administrator.

MS. SHEA: You can finish your answer.

THE WITNESS: She would overlook the consistency of something and call me whenever she had any questions.

MS. SHEA: And I believe we're clearly going beyond the scope of the training materials and asking about people's job responsibilities and duties in 2001. So I'll object on that basis to further questioning along those lines.

MS. MOLINA: If I had the materials it would have made it -- these materials are incomplete so I'm just trying to figure out who --

THE WITNESS: Long time.

MS. MOLINA: -- yes, who attended the training. You don't have a sign-in sheet and I certainly don't have the actual materials that were presented, so. . .

BY MS. MOLINA:

Q: Okay. So the employee, the admin clerks type support staff, people attended?

A: Some branches are bigger than others, and so

[p.183]

some of their responsibilities differ a little bit in each branch because some may only have 13 employees there and they do admin responsibilities, but we wanted to bring them in and give them education so...

Q: And I'm just going to ask you some more about this employee administration training since you presented the training. What was the training with regards to confidentiality about? What did you present?

A: It had to do with if they are forwarding like ESNs or new hire packets that they keep that information confidential.

Q: They, being whom?

A: The admins, that they don't, you know, that those kinds of documents are confidential, people's rates of pay and Social Security numbers that get written on things.

Q: Anything else?

A: It might have had to do with sometimes they would get calls from spouses or people looking for an employee and not

to give -- not to give out information but to be confidential.
Q: How about with regards to exit interviews, what training did you provide on that topic in 2001?
A: Probably to make sure that they encourage

[p.184]

the individual to contact whoever the local HR was whether it be Albuquerque or Phoenix, depending on what branch they were in so that an exit -- to schedule an exit interview or whatever.
Q: Who was to make sure that -- I'm sorry.
Strike that.

When you say make sure they encourage the individual, who do you mean by they? Who do you refer to?
A: Well the admin, the support people that, you know, if they are doing, getting ready to package paperwork and send it to us, they also know that we want to set up something.
Q: Okay. And how are admin people in 2001, according to your training, how were they to encourage, using your word, that the individual contact local HR with regards to exit interviews?
A: Give them our phone number, give us a call and say I'd like to schedule Joe, you know, can you schedule Joe for an exit interview.
Q: And what is the purpose of an exit interview? And we're talking about 2001 .What was the purpose in 2001 of having employees go through exit interviews?
A: You know, to obtain information on do they

[p.185]

feel they had proper training, did they feel that they, you know, that -- if they had any complaints if they were handled timely, you know, how were they treated, what were the

work conditions like, did they have the equipment they needed, stuff like that. Q: And these exit interviews are for employees who are either leaving voluntarily or involuntarily; is that correct?
A: Yeah, it could be either.
Q: And who is supposed to -- in 2001 who was supposed to conduct the exit interview?
A: It could be Sherry Pederson, it could be myself, it could be Barbara Brackett in Phoenix.
Q: Do you know whether an exit interview was conducted with regards to -- if Mr. Peters went through an exit interview?
A: No, I don't.
Q: If I tell you that he did not, would you be able to tell me why he did not have an exit interview?
A: No.
Q: Should he have had an exit interview?
A: Yeah.
Q: Did you do anything to encourage Mr. Peters to contact HR for an exit interview?
A: No.

* * *

[p.194]

Is that what you said?
Q: Yes, ma'am.
A: 303 to 313?
Q: Yes.
A: Yeah, that was my presentation.
MS. SHEA: How long have we been going?
THE REPORTER: Almost two hours.
MS. SHEA: For your purposes, don't we need sort of an exact so you know how much time you have?

MS. MOLINA: Not for my purposes. I think more for yours how many minutes.

MS. SHEA: Well, yeah, this is a two-hour deposition so I'd like to know how many minutes we have left of it.

THE REPORTER: It's been 108 minutes so that's --

MS. MOLINA: 12 minutes left.

MS. SHEA: I'm not going to cut you off in the middle of a question or anything, but I want to I stick to the two-hour limit as much as we reasonably can without cutting you off in the middle of something.

BY MS. MOLINA:

Q: With regards to the materials identified as

[p.195]

Exhibit EE, the 2002 training materials, do they appear to be accurate and complete?

A: Yes.

Q: Do you agree with these, with the contents of training materials?

A: Yes.

Q: Would you turn to page 312, please. The slide reads or the page and copy of your slide reads, "Your Role in Discipline". Whose role in discipline was this intended for?

A: Supervisors and managers.

Q: DSMs included?

A: Yes.

Q: Why are DSMs getting the extent of training key are getting according to these documents with regards to discipline?

A: Why are they getting them?

Q: Yes, ma'am.

A: So they understand the process.

Q: For what purpose?

A: To be able to gather information, know what's going to be important, what they are going to do once they call HR.
Q: In 2002, did the role of DSMs in discipline, did their role include recommending discipline?

[p.196]

A: I suppose -- I guess it depends on the individual. There's some people that recommend, sure.
Q: Okay. In 2001 did the role of the DSM include recommending discipline?
A: I'd say it would be the same.
Q: And the same for 2000?
A: Pretty much.
Q: So this training, the training provided to DSMs with regards to discipline was important because DSMs have some discretion with regards to discipline; is that correct?

MS. SHEA: Object to the form of the question.

THE WITNESS: They have -- yeah, we rely on their discretion.

BY MS. MOLINA:
Q: And that was the same for 2001; is that correct?
A: I believe so, yes.
Q: Why is it important? And I'm looking at page 324, the 2002 training materials.
A: 324?
Q: Yes, ma'am, 324. Oh, this is -- I'm sorry. This has been marked as a different exhibit. This is FF, page 324. This is called Basic Checklist for

[p.197]

Employee Happiness. Is that the EE?
A: Yes.

Q: Why is it important that -- we talked about managers and supervisors being fair, firm and fair in discipline. Why is that important?

A: For consistency and because it's -- as a training guide it's the right thing to do, be fair.

Q: Ms. Edgar, knowing what you know now, what would you have done different with regards to Mr. Peters?

MS. SHEA: Object to the form of the question.

THE WITNESS: Nothing.

BY MS. MOLINA:

Q: Would you look at Exhibit HH. Would you look at all the pages in that exhibit and tell me if that looks complete and accurate to you?

A: Did you say until the blue page here?

Q: Yes, ma'am.

A: Okay. It looks accurate.

Q: Did you prepare the documents in that exhibit? There's some examples in some of these pages and I was wondering if you were the person who --

A: Yes, I --

Q: You're the one who wrote --

EXHIBIT N
EXCERPTS OF DEPOSITION OF
DONALD R. BATELUNA

[p.37]

been in a management position --
A: Okay.
Q: -- did you ever have a situation where you did not follow the general process of -- with regards to these DSNs and how they come about?
A: Not that I recall, no
Q: Okay. So do you have a sense of what kinds -- what situation would cause you to divert from the general process?
MR. PRESNELL: Object to form.
THE WITNESS: No. Every -- as a manager, everything goes to HR.
Q: BY MS. MOLINA: Now, when you say everything -- okay. Let me go back. Okay. So identified the problem, the alleged problem, okay -- do you agree with that?
A: Okay.
Q: That it's alleged; is that correct?
A: Yes.
Q: And you discuss with the employee. For what purpose do you hold a discussion with the employee?
A: You know -- see, it would depend on what the circumstances are. Say someone's late and they've been late, you know, a few times. Then, you know, maybe he had a flat tire, you know. I mean -- you know, why were you late; finding those things out, you know.

[p.38]

Q: All right. And then once you find those things out, then you go to HR on every circumstance?

A: Yes. Not on every circumstance. I mean if it's --
Q: Okay.
A: -- you know, you have to use some common sense as well.
Q: Okay. So -- so you did have some discretion as to what to present to HR, in other words?
A: Yes, I would say.
Q: Do DSMs also have that discretion as to what to present to HR?
A: "Yes' I'd say.
Q: Okay. Do DSMs -- and, again, I'm talking about 2001. Did DSMs have -- have any set guidelines as to their discretion with regards to what to present to HR?
A: No.
Q: No guidelines?
A: No. They need to go by policies and procedures.
Q: Okay. But wouldn't you agree with this: That before they get to policies and procedures, the DSM has the discretion whether to even turn into the policy book the section of policies and procedures, right?

MR. PRESNELL: Object to form.

THE WITNESS: Okay.

[p.39]

Q: BY MS. MOLINA: Is that true?
A: Yes.
Q: So the DSM has the discretion of deciding what to present, first of all, to HR; is that correct?
A: Yes.
Q: And the DSM also had the discretion -- I'm talking about 2001 -- had the discretion to decide whether even to look in the policy manual to see if there's anything, any violation that was committed?
A: Yes.

Q: Is there any -- in 2001, was there any process for -- any process in place that would allow -- that would give HR a sense of what was actually going on in the field with employees and DSMs, other than the DSM coming to the HR person and reporting that?
A: I don't know. I mean, other than the employees.
Q: Just the employees?
A: Uh-huh.
Q: Okay. So if a DSM saw, say, a merchandiser doing something against company policy --
A: Yes.
Q: -- and the DSM did not want to report this employee to HR, HR would never find out; is that right?
MR. PRESNELL: Object to form.
THE WITNESS: I don't know if that's -- I

[p.40]

don't really know. I guess if -- if -- I mean, it depends on what it is. When you're speaking the hypothetical, I mean --
Q: BY MS. MOLINA: All right. Then what if the DSM is aware of a merchandiser refusing to carry out an order --
A: Okay.
Q: -- and the DSM does not report that conduct to HR, and the merchandiser is not going to report that conduct --
A: Right.
Q: -- because that was against his or her own interest, so how would HR find out about that?
MR. PRESNELL: Object to form.
THE WITNESS: I don't know.
Q: BY MS. MOLINA: Okay. In 2001, was there a process where every -- every alleged problem that a DSM encountered with an employee under his management that would require the DSM to record or document problems?
A: Yes.

Q: But, again, that was within -- that was in the DSM's discretion as to what to document or what not to document; is that correct?
A: You should be documenting, you know, pretty much anything that you do with the employee, you know.

* * *

[p.45]

A: No.
Q: What is a direct order?
A: An instruction to do something, follow through something. Q: Anything else?
A: No.
Q: And what do you mean by knowing the circumstances of not following that order?
A: Well you can ask someone to do something and, you know, say for some reason they don't get it done. Well that's not insubordination, you know. They didn't know what the circumstances were. But if you ask someone, I need you to do this specifically and, you know, if you do not follow through with this, here will be the results of your action not to follow a command.
Q: Okay. Anything else?
A: No.
Q: Okay. Let's see. So if a manager tells -- if a manager gives an instruction to, say, a merchandiser to do something --
A: Uh-huh.
Q: -- and the merchandiser does not do it --
A: Okay.
Q: -- it's not insubordination?
A: No.

[p.46]

Q: If the manager gives an instruction to the merchandiser to do something and then adds the magical words of what knowing the circumstances of not following with that order or something to that effect, then it becomes insubordination?

A: Yes.

MR. PRESNELL: Object to form.

Q: BY MS. MOLINA: So what are the magical words? I understand those are my terms. What are the magical words that would get an employee from simply not doing his job to getting fired or being insubordinate?

A: Once again, that's already been answered. What's the circumstances?

Q: Any circumstance. A circumstance where an employee is given an instruction to do something and follow through on something and that direct order --

A: Is the employee saying he's not going to follow through? Usually you give an instruction and the employee follows through on it.

Q: Okay. And how would an employee -- how would an employee be -- be told of this -- strike that. Are there -- what are employees supposed to be told to turn a direct order into an act of insubordination?

A: The only time that would happen is if an

[p.47]

employee says, no, I'm not going to do that or refuses to do it.

Q: Or refuses to do it. Okay. So let's take the first part of your last answer. So if an employee says, I'm not going to do it --

A: Okay.

Q: -- okay -- at that moment, I get -- you give me an

instruction, you're going to do X, and I respond to you and I say I'm not going to do that, have I committed insubordination?
A: At that point in time, no.
Q: Okay. At what point in time will I commit insubordination?
A: At that point I would explain to you, real simple, I've given you a direct order. Okay? If it is not followed, it can be considered insubordination.
Q: And then?
A: That would be it.
Q: So once the manager tells the employee I've given you a direct order and not following it can be considered insubordination, then I'm insubordinate, once you tell me those words?
A: Well, basically what I would simply say, you're asking me this, right? You know, I've given you a direct

[p.48]

order; if you fail to follow this order, he's neglecting to do it, it can be considered insubordination, grounds for termination, then it's the employee's choice.
Q: Okay. So say that the employee --
A: And the employee follows up and does it, then there's no problem.
Q: Even after the employee is told, I am giving you a direct order, if you fail to do this or carry through with this direct order, it can be considered insubordination and could be or would be grounds?
A: Could be.
Q: Could be. So there's some discretion there?
A: Well, you can't fire anybody. HR has that, you know, so --
Q: Okay. So it could be grounds for termination?

A: Right.
Q: And then at what point would -- after receiving -- after receiving that information from a manager would the employee commit insubordination?
A: Whether they did the assigned request or not.
Q: I'm sorry?
A: At the point when they did the request, you know. If they didn't do it, then you could consider it insubordination.
Q: Okay. So there would not be insubordination

[p.49]

until --
A: Until they failed to follow the directive.
Q: Until the act is not done?
A: Right.
Q: Okay.
A: Or failed to follow the directive.
Q: And that means completing the act that you were requested to do?
A: Right.
Q: Okay. Now, when -- okay. Strike that. Okay. I just want to make sure I got -- I'm finished; that I allowed you to answer a complete question on what you did to prepare for the deposition. You reviewed disciplinary status notices that you had signed; is that correct?
A: Uh-huh.
Q: Anything else, other than reviewing DSNs that had signed?
A: That was it.
Q: Any statements?
A: No.
Q: Have you ever provided a statement to counsel --
A: No.

Q: -- in this case? Did you discuss your testimony with anyone,

[p.50]

other than counsel, anybody?
A: No.
Q: Okay. Let's go back to the DSNs. I was asking you about -- we were on Exhibit N, just for purposes of using the DSN form, just so I understand the process.

Okay. Looking at this DSN, and this is Stephen Peters' DSN. Okay?
A: Okay.
Q: The claimant in this case. How -- just by looking at this form, who's the one that made the decision to terminate Mr. Peters' employment?

MR. PRESNELL: Object to form.

Q: BY MS. MOLINA: Just by the information that's contained in this document.

MR. PRESNELL: Same objection.

THE WITNESS: Do you mind if I read it?

MS. MOLINA: Absolutely. Take time to read it.

THE WITNESS: Okay. What was the question?

Q: BY MS. MOLINA: Just by looking at this form, can you tell me who the person was that made the decision to terminate Mr. Peters' employment?
A: Sherry Pedersen.
Q: Why do you say that?

[p.51]

A: She signed and she would have to.
Q: Why is that?
A: Because HR is the only one who can make a decision to terminate.

Q: Okay. And I notice here that you signed as a witness; that's you, right, Mr. Bateluna?
A: Yes.
Q: Right above Ms. Pedersen's signature?
A: Yes.
Q: So you were present at the presentation of this DSN to Mr. Peters?
A: Yes.
Q: So what was the purpose of you being there? I know you signed at the line as witness signature. What was your purpose?
A: As a witness.
Q: as a witness to what?
A: The termination.
Q: Tell me about the termination. What did you witness?
A: I don't really recall a whole bunch about it. What exactly do you want to know about it?
Q: Okay. Who was there?
A: Sherry Pedersen, Cesar Grado, Stephen Peters, and myself.

[p.52]

Q: And who was the person who actually presented the DSN to Mr. Peters?
A: Honestly, I don't remember.
Q: Okay. Do you know -- were you there from the moment that -- well, let me ask you this: Were you there before Mr. Peters arrived at this meeting?
A: I don't remember or not.
Q: Do you remember what Mr. Peters said, if anything, during this meeting?
A: No.
Q: Did he say anything?
A: Not that I recall.

Q: Did Sherry Pedersen say anything?
A: I'm sure she did, but I don't remember what it was.
Q: Okay. Did Cesar Grado say anything?
A: Not that I can recall. I'm sure he said something. I don't know what he said.
Q: Okay. So from what you see on this form, Ms. Pedersen was the person who made the decision; is that right?
A: Well, HR made the decision.
Q: Well --
A: It's common knowledge, Cesar Grado could not do this.

* * *

[p.133]

documented and -- you know.
Q: BY MS. MOLINA: Is the -- if an employee doesn't show up for work, say, three days in a row --
A: Okay.
Q: -- what should happen to that employee? Say an employee doesn't show up to work for three days in a row without notifying anybody --
A: Without calling in?
Q: Yes.
A: It's job abandonment, I believe; no call no show.
Q: Okay. And going back to the violations, Exhibit H, that would be a group C violation?

I'm sorry. That would be a group A violation; is that right? It's in number 10.
A: Yes.
Q: Okay. So if an employee is absent from work for three consecutive work days without notifying the company, according to this policy the employee on the first offense is to be discharged; is that correct?
A: You know, I don't know.
Q: Well, sir' there's a D -- do you see that?

A: Oh, yes.
Q: And then if you'll turn to the first page --
A: Discharge, yes.

[p.134]

Okay. So if an employee commits number 10, that employee should be discharged; is that correct?
A: Yes.
Q: Okay. You know who Arturo Lopez is; is that right?
A: I've heard the name.
Q: You were his immediate supervisor, isn't that correct?
A: No, I was not.
Q: Oh. You were his second level. I'm sorry. You were his second level supervisor?
A: Yes.
Q: So he worked -- he was a merchandiser in Albuquerque when you were a sales manager and he worked under Cesar Grado's management as a DSM; is that correct?
A: Okay.
Q: I mean, I don't want to test your memory to that extent. This is the document that I'm looking at.
A: Okay.
Q: I'm looking at EEOC1-BCI-0063, and we'll mark -- in fact, I will go ahead and mark all of these documents as an exhibit. Well, actually, it's already been marked as an exhibit. Would you turn to Exhibit G.
Okay.
Okay. So this is an employee termination notice

[p.135]

for Arturo Lopez, is that right?
A: Yes.
Q: And it shows here on the -- let me direct your attention to

this part of the document where the signature lines are. It reads: I state that I possess no property belonging to the company nor any outstanding monies owed to the company, and then, there are several signatures; is that correct?
A: Yes.
Q: And then it looks like an employee signature and there's a signature that purports to be that of Arturo Lopez; is that right?
A: First line, yes.
Q: And then Cesar Grado as immediate supervisor?
A: Yes.
Q: And then, second level signature, Don Bateluna?
A: Yes.
Q: And then human resources signature, Sherry Pedersen?
A: Yes.
Q: Or S. Pedersen?
A: Yes.
Q: Now, turn the page of that same exhibit. According -- this is a document that reads -- that's titled Resignation Statement dated November 28, 2001, for

[p.136]

Arturo Lopez. And the supervisor's comments are: Arturo has not returned to work or called anyone for over a week. He has accepted employment with Smith's. Do you see that?
A: Yes.
Q: Now, why would that not be -- why would that show up on the employee termination notice as a voluntary termination, where according to the policy he -- he should have been discharged for being absent from work--

MR. PRESNELL: Object to form; calls for speculation.

Q: -- in this one, for over a week?
A: I don't know.

Q: You signed off, sir, on this --
A: Yes.
Q: -- employee termination notice. So do you have any explanation why Mr. Lopez's not showing up for work for over a week, November -- for over a week, actually, is showing up as a voluntary termination instead of a discharge under group A violation?

MR. PRESNELL: Object to form.

THE WITNESS: I don't know, to be honest with you.
Q: BY MS. MOLINA: Okay. And then would you turn

[p.137]

the page. Then there's a second resignation statement for Arturo Lopez, and this one's dated December 27, 2001, approximately a month after the resignation statement on page 166. And according to this document that was signed by Mr. Grado, Mr. Lopez missed three day consecutively without notifying the company. Do you see that?
A: Yes.
Q: Now, why -- why is that -- was that sufficient, according to the policy, for Mr. Lopez to have been terminated or discharged from his employment --

MR. PRESNELL: Object to form.
Q: -- according to the company's policy?
A: Was what sufficient? This three days?
Q: The three days consecutively without notifying the company.
A: Yes.
Q: Okay. -- Now -- so why -- why is that not shown on this employee termination notice on page 163; that he in fact committed a group A violation for which he was fired?
A: It does.
Q: Okay. Where does it show that?

A: Rehire consideration: No notice, no call no show three days.

[p.138]

Q: Okay. Where does it show that he was fired?
A: I don't see a spot where it says he's fired, but it's a termination notice and it says: Consideration rehire, no; no notice, no call no show for three days.
Q: But where does it say that he was fired for committing the group A violation?

MR. PRESNELL: Object to form; asked and answered.

THE WITNESS: Doesn't

Q: BY MS. MOLINA: Okay. So this form reports or discloses Mr. Lopez's termination as a voluntary termination; is that correct?
A: That's what's checked.
Q: Okay. Even though he committed a group A violation, which called for discharge; is that correct?
A: Yes.
Q: Okay. When you signed this termination notice, sir, on page 163 of Exhibit G, did you question that, why Mr. Lopez would be allowed to voluntarily resign when he had committed a group A violation?

MR. PRESNELL: Object to form.

THE WITNESS: No, I did not.

Q: BY MS. MOLINA: Why not?
A: I don't recall. This is four days after that I signed it.

[p.139]

Q: Four days after that you signed what?
A: The 14th.
Q: You're reading the date of January 14, 2001, on your -- next to your signature --
A: Right.
Q: -- is that right, on page 163?
A: Yes.
Q: So -- so -- what's that got to do with why you didn't ask why, if this employee missed three days consecutive --
A: Well, I looked on -- right here where it says no notice, no call no show three days, and we know no call no show, you know, is a termination?
Q: So a no call no show for three days -- no call -- so Mr. Lopez was able to blow off work for three days in a row, not even call his supervisor, and he was allowed to voluntarily resign, or at least this form shows he voluntarily resigned?

MR. PRESNELL: Object to form.

THE WITNESS: That's what's checked here, but on the bottom is what states why.
Q: BY MS. MOLINA: But according to this form, he was not fired for not showing up to work three days in a row and failing to notify anybody; is that right?

MR. PRESNELL: Object to form.

[p.140]

THE WITNESS: There's nothing that says fired on the form, no.
Q: BY MS. MOLINA: Okay. Now, do you have an explanation, sir, since you signed off on his termination notice, why there's a resignation statement on November 28, 2001, and then a resignation statement for December 17, 2001?

A: No, I do not.
Q: Okay. Now, there's a DSN in here for Arturo Lopez -- Mr. Lopez -- let's see. Mr. Lopez committed -- well, according to the documents -- according to the documents that we have in this exhibit, November 28 Mr. Lopez had not returned to work or called anyone for over a week; December 27, it shows that he had missed three days consecutively without notifying the company; on May 9, 2001 -- and I'm looking on page 195 -- he was written up for -- it was categorized as a group C, failure to carry out normal assigned duties for an incident which included him not following instructions to work the load. Do you see that?
A: Yes.
Q: And these were instructions after he had been asked twice to do his job or to carry out a particular task; do you see that? And he didn't do it; do you see that?

EXHIBIT O

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ-02-1644
JOB/RHS (ACE)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, d/b/a PHOENIX COCA-COLA BOTTLING COMPANY and COCA-COLA BOTTLING COMPANY OF ALBUQUERQUE, Defendant.	)

AFFIDAVIT OF JAMES YOUNG

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

I, James Young, duly sworn, hereby state as follows:

1. My race is that of African American

2. I worked as a Merchandiser for Coca-Cola Bottling Company of Albuquerque from October 1995 until October 2000.

3. During my employment with Coca-Cola Bottling Company of Albuquerque, Cesar Grado was my District Sales Manager for approximately 3-6 months.

4. During my employment with Coca-Cola Bottling Company of Albuquerque, Cesar Grado was not my immediate supervisor. I reported directly to Dave (LNU), and before that I reported directly to Edward Esquibel.

5. During my employment with Coca-Cola Bottling Company of Albuquerque, I personally observed how Cesar Grado treated the employees.

6. African American employees were treated worse by Cesar Grado as compared to non-African American employees.

7. During my employment with Coca-Cola Bottling Company, I never received any training regarding race discrimination.

8. I recall speaking with Sherry Pedersen on several occasions regarding employment issues such as insurance and W-2 forms.

9. I left employment with Coca-Cola Bottling Company because of Cesar Grado. When he became the District Manager he began "nit-picking" my work and constantly threatened to change my days off and to change my route. I did not witness Mr. Grado treat non-African American employees in this manner. For example, Mr. Grado threatened to change my day off one time when the back room of a store that I serviced was a bit messy during a particularly busy time. I witnessed many times Damien Mirabal's back room being very messy and it was never an issue with Mr. Grado.

I swear under penalty of perjury that the foregoing testimony is a true and correct statement of the facts.

DATE: 3/12/04 /s/_____
James Young

SUBSCRIBED AND SWORN to before me on this 12th day of March 2004 by James Young.

My Commission Expires:
4/26/06 /s/_____
Notary Public

EXHIBIT P

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ-02-1644
JOB/RHS (ACE)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, d/b/a PHOENIX COCA-COLA BOTTLING COMPANY and COCA-COLA BOTTLING COMPANY OF ALBUQUERQUE,
Defendant.

AFFIDAVIT OF BRYAN ESQUIBEL

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

I, Bryan Esquibel, duly sworn, hereby state as follows:

1. My National Origin is that of Hispanic.

2. I worked for Coca-Cola Bottling Company of Albuquerque from March 12, 1998 until I was terminated

in April 24, 2002. During my employment I held a driver position and a merchandiser position.

3. During my employment with Coca-Cola Bottling Company of Albuquerque, Cesar Grado was the District Sales Manager.

4. During my employment with Coca-Cola Bottling Company of Albuquerque, I personally observed how Cesar Grado treated the employees.

5. African American employees were treated worse by Cesar Grado as compared to non-African American employees.

6. If Grado did not like you, he treated you badly; but African American employees were treated even worse.

7. Stephen Peters was treated badly by Cesar Grado.

8. I am aware of employees at Coca-Cola Bottling Company not following directives, and who were not fired: Javier Barboa, Leroy Sanchez, Marcos Vega, Dominique Chavez, Cameron Ward, and Adolfo Perez. These employees would do whatever they wanted to do, and would not get fired.

9. During my employment with Coca-Cola Bottling Company, I never received any training regarding race discrimination.

I swear under penalty of perjury that the foregoing testimony is a true and correct statement of the facts.

DATE: 3/12/04 /s/_____

Bryan Esquibel

SUBSCRIBED AND SWORN to before me on this 12th day of March 2004 by Bryan Esquibel.

My Commission Expires:
12/12/06

/s/_____
Notary Public

EXHIBIT Q

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ-02-1644
JOB/RHS (ACE)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, d/b/a PHOENIX COCA-COLA BOTTLING COMPANY and COCA-COLA BOTTLING COMPANY OF ALBUQUERQUE, Defendant.	)

AFFIDAVIT OF MICHAEL WILSON

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

I, Michael Wilson, duly sworn, hereby state as follows:

1. My race is that of African-American.

2. In 1997 I was hired by Bill Donnelly as a Merchandiser for Coca-Cola Bottling Company of Albuquerque. I held that position until I resigned in 2000.

3. During my employment with Coca-Cola Bottling Company of Albuquerque, my direct supervisor was Edward Esquivel, who then reported to Cesar Grado.

4. It was my understanding and practice that if I was unable to work on a particular day, Edward Esquivel was the person who I notified regarding my absence.

5. I recall many race-based remarks made to me by Cesar Grado during work hours, these include:

   A. Telling me that Black guys did not look good in trucks, they should drive Cadillacs;

   B. Telling jokes regarding Black men dating Anglo women;

   C. One day during the winter, Cesar Grado ordered me to clean an outside vending machine (which is not the duty of a Merchandiser) and while he watched me work, he remarked that the "brothers" don't like the cold so I should hurry up and finish as soon as possible.

6. During my tenure with Coca-Cola Bottling Company Of Albuquerque, I applied for a sales position within the company. When I attempted to follow-up on the application I had submitted by hand to Human Resources, I was told that my application was never received, therefore I was not considered for the sales position. The position was given to an Hispanic male.

7. It is my belief that Cesar Grado dislikes African Americans based on his treatment of me during my employment at Coca-Cola Bottling Company of

Albuquerque. While he treated Hispanic Merchandisers with respect, he continually demeaned me and threatened to replace me. In addition, I observed that Cesar Grado was unusually picky regarding the stores serviced by me and the two other African American Merchandisers, often calling us back to stores that had been serviced to redo some minor detail, while the Hispanic Merchandisers were not subject to this same level of scrutiny.

8. I resigned my position at Coca-Cola Bottling Company of Albuquerque due in part to Cesar Grado's race based remarks to me, his continual threats to fire me, and his unusually high level of scrutiny regarding my work to which Hispanic Merchandisers were not subjected.

I swear under penalty of perjury that the foregoing testimony is a true and correct statement of the facts.

DATE: 3-12-04 /s/_____
Michael Wilson

SUBSCRIBED AND SWORN to before me on this 12th day of March, 2004 by Michael Wilson.

My Commission Expires:
12/12/06 /s/_____
Notary Public

EXHIBIT R

NEW MEXICO DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE BUREAU
P.O. BOX 1728
ALBUQUERQUE, N.M. 87103

NOTICE OF CLAIM DETERMINATION

STEPHEN R PETERS
208 FENTIMAN
ALBUQUERQUE NM 87105

YOU TERMINATED STEPHEN R PETERS AFTER BEING NOTIFIED OF AN INABILITY TO REPORT FOR WORK AS SCHEDULED. THE REASON FOR FAILURE TO REPORT FOR WORK WAS BEYOND THE CONTROL OF YOUR FORMER EMPLOYEE. AS AN EMPLOYER YOU HAVE THE RIGHT TO DISCHARGE AN UNSATISFACTORY EMPLOYEE BUT UNLESS MISCONDUCT IS ESTABLISHED, NO DISQUALIFYING CONDITIONS EXIST. THIS CLAIM IS CLEARED UNDER SECTION 51-1-7(B) OF THE UNEMPLOYMENT COMPENSATION LAW EFFECTIVE WITH THE CALENDAR WEEK ENDING 10/06/01. YOUR ACCOUNT IS LIABLE FOR BENEFIT CHARGES FOR BENEFITS PAID BASED ON THIS PERIOD OF EMPLOYMENT UNDER SECTION 51-1-11(B) OF THE UNEMPLOYMENT COMPENSATION LAW.

BCI COCA-COLA BOTTLING CO LOS ANGELES
1334 S CENTRAL AVE
LOS ANGELES CA 90021

APPEAL RIGHTS

This determination is final unless an appeal is filed WITHIN FIFTEEN CALENDAR DAYS from OCTOBER 19, 2001.

APPEAL PROCESS

An appeal can be filed at your nearest Workforce Development Center or by mail to the New Mexico Department of Labor, Appeals Tribunal Section, P.O. Box 1928, Albuquerque, N.M. 87103. If you appeal by mail, please include your social security number. If the fifteenth day falls on a weekend or holiday, you have until the following work day to file the appeal. The time limit may only be otherwise extended by the Appeals Section on a showing of good cause. The Workforce Development Center can also provide additional information or assistance in filing an appeal.

NOTE TO CLAIMANT

If you are unemployed while your appeal is pending, continue to file continued claims. If the final decision holds you eligible, you can be paid only for those weeks for which you have filed claim notifications and met all other eligibility requirements.

If your employer challenges a decision allowing [illegible] the appeal decision is in his favor, you will be required to repay the benefits paid [illegible] period you are denied.

EXHIBIT S

EXCERPTS OF DEPOSITION OF STEPHEN BRIAN PETERS

[p.69]

Q. Were you ever involved at the decision-making level regarding the discipline of an employee between 1999 and 2001?
A. No, sir.
Q. Were you ever involved in a meeting with any decisionmaker regarding the discipline of another employee between 1999 and 2001?
A. No, sir.
Q. Do you have any firsthand knowledge of any discipline that was imposed upon any employee between 1999 and 2001, other than yourself?
A. As far as, could you explain that?
Q. I'm asking if you have any firsthand knowledge of the implementation or imposition of discipline on other employees.
A. No, sir.
Q. Okay. Did you ever supervise Monica Lovato?
A. No, sir.
Q. Did you ever supervise Damien Mirabel?
A. No, sir.
Q. Did you ever supervise Arturo Lopez?
A. No, sir.
Q. Okay. Were you ever involved in the decision-making process with respect to discipline of employees Lovato, Mirabel and Lopez?

[p.70]

A. Involved, you say?
Q. In the decision -- yes, involved in the decision-making process.
A. No, sir.
Q. The district sales manager you worked under was Cesar Grado?
A. Yes, sir.
Q. Is that true for the entire time of 1999 through 2001?
A. I don't know if it was 1999. It might have been 2000 and 2001, if I'm not mistaken.
Q. May have been the years 2000 and 2001?
A. Yes, sir, if I'm not mistaken.
Q. All right. Who was the district sales manager that you worked under, then, in 1999, prior to working for Mr. Grado.
A. Bill Donnelly.
Q. Do you know why your district sales manager changed from Mr. Donnelly to Mr. Grado?
A. No, sir.
Q. Between 1999 and 2001, who made the weekly schedules for merchandisers?
A. If I'm not mistaken, I think it was Cesar Grado.
Q. Between 1999 and 2001, who approved vacation or days off for merchandisers?

[p.71]

A. The immediate supervisor, if I'm not mistaken.
Q. Okay. Do you know?
A. I would always go to my immediate supervisor.
Q. All right. Maybe I asked it poorly. I'm asking who approved vacation days or days off for merchandisers between 1999 and 2001.

A. The immediate supervisor, whoever your immediate supervisor was. That's who I went to.
Q. Okay. And who was your immediate supervisor?
A. It changed.
Q. What do you mean, it changed? It changed between 1999 and 2001?
A. Yes.
Q. Is there a form, an approval form for vacation days at Coca-Cola Bottling Company?
A. I can't recall if I filled out a form or if it was just notice. I think it was -- I would give my supervisor notice.
Q. Did it have to be written notice?
A. Yes. I think it was a form we had to fill out, if I recall.
Q. Between 1999 and 2001, did you take some vacation?
A. Yes, sir. If I recall, I had. If I had it, I took it.

[p.72]

Q. If you had it, you took it?
A. Yeah.
Q. Well, you had it, didn't you?
A. Yeah.
Q. All right. And your memory is, you filled out some sort of form for certain days, whatever vacation --
A. If I recall, yes.
Q. Okay. You said that your stores on your route changed --
A. Uh-huh.
Q. -- at some point between 1999 and 2001; is that correct?
A. Uh-huh.
Q. Yes?
A. Yes, sir. Sorry.
Q. That's all right. And I believe you said you couldn't remember exactly when it changed; is that true?
A. Yes, sir.

Q. Okay. As of October 2001, before your termination, what stores were on your route?

MS. MOLINA: Object to the form of the question. It's very ambiguous. Could you provide more of a time frame other than as of October 2001?

Q. (By Mr. Presnell) Can you answer the question?

A. If I'm not mistaken, I think it was Albertsons

[p.73]

on Lomas and Juan Tabo, Furr's on Lomas and Tramway -- let me think here for a minute. It's been so long. Furr's on Candelaria and Juan Tabo, and I think it was the Walgreens on Eubank, if I'm not mistaken.

Q. Okay. Albertsons, that's a supermarket?

A. Yes, sir.

Q. You had two Furr's stores?

A. Yes, sir.

Q. And what are those? Supermarkets?

A. Supermarkets, yes, sir.

Q. And one Walgreens location?

A. Yes, sir.

Q. Okay. Four stores?

A. Yes, sir.

Q. Okay.

A. Might have been five, if I'm not mistaken.

Q. Might have been one more?

A. Might have been.

Q. Is there a Raley's out here?

A. Yeah. That's what I was thinking, if I had that Raley's at that time or not. I can't recall.

Q. But at some point, you had a Raley's?

A. Yes, I had a Raley's.

Q. Describe for me just a normal day in your work life as a merchandiser with these stores.

[p.74]

A. Hard work.
Q. Take me from the time you get up, where you go, where you report, through the end of the day, just in general.

MS. MOLINA: I'm going to object to the form of the question, overbroad, vague, ambiguous. But go ahead.

A. From 5:00 in the morning until whenever, you go do your stores, merchandise your stores, from store to store, sometimes second service, most of the time without a lunch.
Q. (By Mr. Presnell] Would you report to the Coca-Cola facility before you went to your stores?
A. Yes, sir.
Q. Okay. So the first place you go every morning is to the facility?
A. Yes, sir.
Q. And what do you do at the facility?
A. Clock in by telephone.
Q. Clock in by telephone.
A. Yes, sir.
Q. All right. Do you do anything else at the facility?
A. At the end of the day, you clock out.
Q. Okay. I'm sorry. In the morning.
A. In the morning?

[p.75]

Q. When you first get there.
A. Merchandise.
Q. Okay. You clock in?
A. Yes, sir.
Q. And then what do you do? You leave the facility and go to your first store?

A. No. You clock in at your first store. Say if I have an Albertsons, I go to my Albertsons, and I'll b there at 5:00 in the morning.
Q. Okay.
A. I get the telephone in the Albertsons, I punch the number in, the Kronos and then my Social Security number, and it automatically clocks me in. Then I hang the phone up.
Q. Okay. So you do not go to the Coca-Cola facility here in Albuquerque first?
A. No, sir. We used to.
Q. You go straight to your first store?
A. Yes, sir.
Q. Okay. I'm sorry. And you clock in by telephone?
A. Yes, sir.
Q. And then you begin merchandising?
A. Yes, sir.
Q. I imagine some days it takes longer than other

[p.76]

days at other stores?

MS. MOLINA: Object to the form of the question.

Q. (By Mr. Presnell) Is that a fair statement?
A. Yes.
Q. Depends on what's going on?
A. Yes, sir.
Q. Depends on how much product is there and how much product is not there, that type of thing?
A. Yes, sir.
Q. Every day is a little different?
A. Yes, sir.
Q. Okay. When you finish working your first store, let's just say it's Albertsons for purposes of our discussion, you then go to your second store?
A. Yes, sir.

Q. And do the same thing?
A. I merchandise, but I don't clock in. You don't clock in? No, sir.
Q. You merchandise?
A. Yes, sir.
Q. You don't clock out again --
A. Until the end of the day.
Q. All right. Once you leave that first store, do you ever go back to that store?

* * *

[p.81]

A. I would have to go down a list.
Q. Okay.
A. It could be Jeff Katt; could be Eddie Esquivel; could be Dave Lucero; it could be Melanie, I can't think of her last name; could have been Tony Stephenson; could have been Steve Jaramillo; it could have been Billy Priest; it could have been -- let me think. Those are all my supervisors since I'd been there.
Q. Okay. Well' let me stop you just a minute. These four stores that you identified for me -- Albertsons, the two Furr's locations and Walgreens -- was there an account manager on each of those stores?
A. Not -- one account manager for all of the stores.
Q. One account manager for each store?
A. Yes, sir.
Q. Are you saying that the same account manager covered all four of those stores?
A. Yes, sir.
Q. All right. As of October 2001, who was that?
A. Jeff Katt.
Q. All right. Did you ever have a route where you had stores that had more than one account manager?
A. Yes, sir.

Q. Okay. For instance, if you had four stores, two

[p.82]

of them could have been run by account manager Jeff Katt?
A. Uh-huh.
Q. The other two could have been run by a different account manager?
A. Yes, sir.
Q. But you still merchandised all four stores?
A. Yes, sir.
Q. All right. That happened in your career?
A. Yes, sir.
Q. Okay. Do you know what the job duties of an account manager were as of October 2001?
A. Take the orders for the stores, bring POS to the stores, point of sale, and try to get displays up front, things of that nature.
Q. Okay. Did account managers, as a general rule, do any merchandising?
A. I've seen some.
Q. But that's not really part of their daily function, is it?
A. No.
Q. All right. And do account managers, or did account managers in 2001, deliver product to these stores?

MS. MOLINA: Object to the form of the question, overbroad, vague, ambiguous. Go ahead.

A. Deliver product?

[p.83]

Q. (By Mr. Presnell) Yes.
A. I may have seen some account managers bring some cases of soda in their vehicle.
Q. But generally, who delivered the product?

A. Truck drivers.
Q. Truck drivers?
A. Yes.
Q. Did you drive your own vehicle to these stores?
A. Yes, sir.
Q. At the end of your day, then, when you're calling to check out, I guess, and let the supervisor know that you've finished and whether or not you need to do anything else, did you ever call Cesar Grado?
A. No, sir.
Q. Never did?
A. I called my immediate supervisor.
Q. Okay.
A. Only if my immediate supervisor wasn't around or in town.
Q. You only called Cesar Grado if your immediate supervisor was not around or not in town?
A. Yes, sir, on vacation or something like that.
Q. Okay. How does an account manager know what stores that he doesn't manage, what the needs of those stores are?

[p.84]

A. Now, what's that?
Q. How do account managers know what the needs of other stores are that they do not manage?
MS. MOLINA: Object to form, calls for speculation. Go ahead.
A. That they do not manage?
Q. (By Mr. Presnell) Correct.
A. All the stores are managed under someone.
Q. Okay.
A. All of them have account managers.
Q. Correct. But they don't all have the same account managers.

A. No, sir.
Q. Is that true?
A. Yes, sir.
Q. Okay. So how does one account manager know what the needs are of stores for which he is not the account manager?
MS. MOLINA: Object to form, calls for speculation.
A. That's not his concern. If he's not the account manager of a store, he's only supposed to do his stores. I mean, other stores, he's not accountable for that.
Q. (By Mr. Presnell) So one account manager, then, really is only responsible for and knows what merchandiser

* * *

[p.117]

Q. All right. Why did they, if they have annual performance reviews, do you know why Sundancer gave you raises earlier, prior to that?
A. Yes, sir.
Q. Why?
A. Because the owner of the company came to me and told me I was doing a wonderful job and I was one of the best employees, so he gave me a raise, too.
Q. What do you mean, "too"?
A. Well, not "too." Of me.
Q. Okay.
A. Well, "too'" I meant "too" as far as the raise that Trong gave me for moving up to doing another position.
Q. I see.
A. That's what I meant by "too."
Q. So one of the raises was when you moved from the shiner position to the molder position?
A. Yes, sir.
Q. Okay. And then you got an additional raise on top of that from the owner?

A. Yes, sir. The owner came directly to me and gave me a raise.
Q. What's his name again?
A. Steven Stacy.

[p.118]

Q. And then your third raise was your annual raise?
A. Yes, sir.
Q. All right. I understand. You do expect to at least get an annual review every year; is that fair?
A. Yes, sir.
Q. May or may not get a raise?
A. May or may not.
Q. Hope you do?
A. Hope I do.
Q. Were you ordered to work on Sunday, September 30th, at Coca-Cola Bottling Company of Albuquerque?
A. I was asked to work.
Q. Were you ordered to work on Sunday, September 30th, 2001?
A. I was asked to. I was asked to work.
Q. You were asked to work by who?
A. Cesar Grado.
Q. Did Mr. Grado order you to work on Sunday, September 30, 2001?
MS. MOLINA: Asked and answered.
A. Excuse me?
Q. (By Mr. Presnell) Did Mr. Grado order you to work on Sunday, September 30, 2001?
A. He asked me to work.

[p.119]

Q. Okay. I understand you're saying he asked you. Are you telling me that he did not order you to work on that day, September 30, 2001?
A. Like I said, he asked me, told me or asked me.
Q. Did Mr. Grado ever give you a direct order to work on September 30, 2001?
A. He called me.
Q. Okay. When did Mr. Grado call you?
A. I think it was on a Friday.
Q. What date?
A. The 28th.
Q. September 28, 2001?
A. Yes, sir, if I'm not mistaken.
Q. Okay. Where were you when he called you?
A. I was at -- if I'm not mistaken, I was at one of my grocery stores. If I'm not mistaken, I think it was Raley's.
Q. September 28, 2001 was a Friday.
A. Yes, sir.
Q. Did you work that day?
A. Yes, sir.
Q. Did Mr. Grado call you at the store or on your cell phone while you were at the store?
A. He paged me.
Q. He paged you?

[p.120]

A. Yes, sir.
Q. Did you call him back?
A. Yes, sir.
Q. Immediately?
A. Yes, sir.
Q. What time of day was it?

A. If I'm not mistaken, it might have been close to noontime, 1:00, something like that, if I'm not mistaken.
Q. Approximately?
A. Approximately.
Q. Okay. Had you completed approximately half of your day by that time?
A. Yes, sir.
Q. And what did Mr. Grado say when you called him back?
A. He said, "I need you to come in on Sunday to work."
Q. Okay. Sunday being September 30, 2001?
A. Yes, sir.
Q. All right. When you called Mr. Grado, did you call him on his office phone or cell phone?
A. Cell phone, if I'm not mistaken.
Q. All right. Do you know where Mr. Grado was physically?
A. No, sir.

* * *

[p.133]

name.
Q. You mean a person or a hospital or clinic?
A. No, it's -- I can't think of it. I know where it's at, but I can't think of the name right now.
Q. Where is it?
A. It's off the freeway, right next to -- let me think. Down there by Petsmart, that big building down there. I can't think of the name, I can't think of what it is. Blue Cross Blue Shield.
Q. Okay. What does she do there?
A. She's on the computer, I guess, whatever they do with claims or whatever.
Q. Okay. How long has she been working there?
A. I don't know how long.
Q. A few months, or longer?

A. Oh, no, longer than that, yeah.
Q. Okay. What's her telephone number?
A. 270-3537.
Q. Is that home?
A. Cell number.
Q. Okay. Does she have a home line?
A. Yes. I have it programmed in my phone. I don't know it off the top of my head, her house number.
Q. Okay. Do you usually communicate with her by cell phone?

[p.134]

A. Yes, sir.
Q. After September 28, 2001, when was your next communication with Mr. Grado?
A. After -- excuse me?
Q. After your conversation with Mr. Grado on September 28, 2001, when was your next communication with Mr. Grado?
A. That Monday.
Q. October 1, 2001?
A. Yes, sir.
Q. Where were you?
A. At work, at a meeting for -- a health meeting, if I'm not mistaken.
Q. This is at the plant?
A. Yes, sir.
Q. Did you work Monday, October 1?
A. Yes, sir.
Q. Did you do your merchandising that day?
A. Yes, sir.
Q. All your stores?
A. Yes, sir.
Q. That morning, you just had a meeting regarding some health issues?

A. No, it wasn't that morning. It was that evening.

[p.135]

Q. All right. I'm sorry.
A. I worked all day.
Q. You worked all day?
A. I worked from 5:00, if I'm not mistaken, until 5:00.

Q. Okay. And then you went to a meeting?
A. Yes, sir.
Q. All right. What kind of meeting was it?
A. I think it was for health insurance, if I'm not mistaken.
Q. Okay. And this is back at the Coca-Cola facility?
A. At the plant, yes.
Q. And you saw Mr. Grado there?
A. Yes, sir.
Q. All right. Did you talk to him by phone that day, October 1, 2001?
A. I can't recall that I had. Huh-uh, no, sir, I don't think so.
Q. All right. Did you have a conversation with Mr. Grado that evening?
A. Yes, sir.
Q. Tell me the substance of the conversation.
A. I was sitting in the meeting, and Mr. Grado walked up to me and said, "I need you to be down at the

[p.136]

plant at 8:00 in the morning."
And I said "Okay."
Q. Okay.
A. And that was it.
Q. That was it?
A. Uh-huh.

Q. Did he tell you why?
A. He didn't tell me why, no, sir.
Q. Did you ask why?
A. I didn't ask why, no. He just said to meet him at the plant. He walked by and he stopped. It was during the meeting.
Q. Okay.
A. He just told me, "Meet me down at the plant at 8:00 tomorrow morning."
Q. What did you say?
A. I said "Okay," and he walked away.
Q. Okay. Anything else involved in that conversation?
A. No, sir.
Q. All right. Did you talk to Mr. Grado on any other occasion that day, October 1, 2001?
A. I can't recall.
Q. Did you talk to Mr. Grado on Saturday, September 29th, 2001?

[p.137]

A. No, sir.
Q. Did you talk to Mr. Grado Sunday, September 30th, 2001?
A. No, sir.
Q. Did you meet Mr. Grado at 8:00 on Tuesday, October 2, 2001?
A. Actually, I called him and told him I was running a little behind because I was building a display, and I think it was actually like 8:45. I told him I was going to be a little bit late. I think I arrived at 8:45, if I'm not mistaken, maybe 9:00.
Q. All right. That morning, though?
A. Yes, sir.
Q. And where did you meet Mr. Grado?
A. Down at the plant, in Sherry Peterson's office.
Q. All right. In Ms. Peterson's office?

A. Yes, sir.
Q. All right. Who was present?
A. Cesar Grado, Don Bonaluna and Sherry Peterson.
Q. Who is Don Bonaluna?
A. Don Bonaluna is the branch manager, if I'm not mistaken.
Q. Okay.
A. He's Cesar's boss.
Q. All right. The three of them were there and you

[p.138]

were there?
A. Yes, sir.
Q. Anybody else there?
A. No, sir.
Q. All right. Did you tape this meeting?
A. No, sir.
Q. Tell me about the meeting. What happened?
A. I walked in, and Cesar asked me, "Do you know why you're here?"

I said, "I do not."

He said, "You've been terminated for insubordination, for not showing up for work." Then he said, "I need your badge, I need your pager, and you can turn your uniforms in when you get them all together."
Q. Did Mr. Bonaluna, did he say anything at this meeting?
A. I can't recall him saying anything.
Q. Did Ms. Peterson say anything at this meeting?
A. I can't recall Ms. Peterson saying anything, either.
Q. Okay. Did you say anything at this meeting?
A. Yes, sir.
Q. What did you say?
A. After he told me that I was terminated and he said for insubordination for not showing up for work, I

[p.139]

told him that I had reported off work because I wasn't feeling well, I was sick, and I reported off to my immediate supervisor, who didn't have a problem with me calling in sick because I went to the doctor. Neither one of them asked me why I didn't show up for work, like did I have a flat tire, was someone sick in the family. Neither one of them gave me the opportunity to explain. All they done was hand me the termination paper and that was it.

Q. Okay.

A. But after I told them that, they all got quiet. And when I left they shut the door and was in there talking.

Q. Okay.

A. They didn't give me --

Q. All right. So Mr. Grado said "You're terminated for insubordination"?

A. Yes, sir.

Q. Your response was that you were sick; is that right?

A. Yes, sir.

Q. Okay. And did Mr. Grado or Ms. Peterson say anything in response to your statement?

A: No, sir.

Q. Didn't speak another word?

A. Didn't -- no, sir, not that I recall. They

[p.140]

didn't say anything. That was it.

Q. Did they say, "Goodbye, have a nice day"?

A. They maybe said, "I need you to sign this paper," the paper that you have over there, to sign a paper.

I said, "I'm not signing it because I wasn't insubordinate."

They said, "It's not admitting guilt." Because I wanted a

copy. So they said the only way I could get a copy was if I signed it. So that's why I signed, because they said I did not get to get a copy of that paper.
Q. Okay. Did you say anything else at that time?
A. I can't recall. I think that's when I told them, "Neither one of you asked me why I didn't even show up for work." I told them, "You'll be hearing from my attorneys." I think that's the last thing I told them.
Q. You told them that they would be hearing from your attorneys?
A. Yes, sir.
Q. Was anything else said in this meeting?
A. That's all I remember.
Q. Okay. And then you left?
A. Yes, sir.
Q. And where did you go?
A. Home.

* * *

[p.145]

A. No, sir.
Q. Do you keep a calendar of any kind?
A. A calendar, I might have a little calendar on the refrigerator or something like that.
Q. Did you call the girls in Las Cruces to tell them you weren't coming?
A. My cousin probably did that.
Q. But did you?
A. No' I didn't.
Q. Had you already packed for the weekend trip?
A. It was only going to be a couple days. Just a couple pair of pants and things like that.

Q. Did you have to unpack that day; do you remember unpacking on Saturday the 28th?
A. No. It wasn't much I was going to take as far as packing and unpacking.
Q. Well you had to pack something.
A. Yeah, I mean a couple pair of pants and shirts and stuff like that.
Q. Do you remember unpacking on Saturday?
A. I don't remember unpacking, no, sir.
Q. Okay. So late afternoon or early evening, you go see a physician or some sort of health care provider?
A. Yes, sir.
Q. Who did you go see?

[p.146]

A. I can't think of the doctor's name.
Q. Okay.
A. I don't have a primary.
Q. All right. Where did you go?
A. I went to Presbyterian on Isleta and Rio Bravo.
Q. Is that the medical center or the hospital?
A. That's the medical center.
Q. And what did you do? You went in the doors?
A. I just went in, sat down, filled out the paper to be seen, and that was it.
Q. Did you make an appointment prior to going?
A. No, sir. It's like emergency, like where you just walk in.
Q Okay. It's an emergency room?
A. What do you mean by "emergency room"?
Q. I guess I have a distinction between an emergency room and a walk-in clinic.
A. Uh-huh.
Q. An emergency room, for instance, is where an ambulance would bring an accident victim.

A. Oh, no. It wasn't -- I mean -- no. I mean, it's a facility where you go in, you sign and you wait to be seen by a doctor.
Q. Okay. I understand. All right. And you did that?

[p.147]

A. Yes, sir.
Q. How long is it open?
A. It's open until, if I'm not mistaken, maybe 7:00, 8:00 in the evening. Maybe from 9:00 until 8:00, if I'm not mistaken.
Q. Okay. At what time of day on Saturday did you decide to go to the doctor?
A. It was in the evening, if I'm not mistaken.
Q. You made a decision late afternoon or early evening, and you went?
A. Yes.
Q. All right. And did you see a doctor or a nurse or physician's assistant or --
A. I went in the room, there was an assistant, and then a doctor come to see me.
Q. Was the assistant a nurse?
A. If I'm not mistaken.
Q. Was it a female?
A. Yes.
Q. Did she take down some notes from what you told her was wrong with you?
A. Yes.
Q. All right. And what did you tell her was wrong with you?
A. I told her that I wasn't feeling well, headache,

[p.148]

sinuses, things of that nature.
Q. Okay. Did you have a cough?

A. Did I have a cough?
Q. Yes.
A. Yes, sir. If I recall I think I was coughing.
Q. Okay. Did you tell the nurse you were coughing?
A. I can't recall what all I told her. I just told her what I told you, as far as I wasn't feeling well as far as headache, sinuses, fatigued.
Q. Did you have a fever?
A. I was running -- I'd say I had a fever because, like I said, I wasn't feeling well. I mean' you know --
Q. Did either the nurse or the physician that you saw take your temperature?
A. I can't recall if they did, if they took my temperature or not.
Q. Did they take your blood pressure?
A. I think they did.
Q. Did they get a blood sample?
A. They didn't get a blood sample, no.
Q. Okay. The doctor that saw you -- well, I assume it's a doctor. Was it a doctor?
A. Yes, sir.
Q. All right. Was it a male or female?
A. Female.

[p.149]

Q. Do you know her name?
A. No, sir.
Q. What did she do when she came in?
A. She came in and asked me what was my symptoms and everything, and I told her. And she checked my ears and if I recall, my nose and mouth. You know how doctors probe you. She did all that, and that was it.
Q. Okay. Did she give you a diagnosis?

A. Yes. She said I had a sinus infection.
Q. Did she give you any treatment for that?
A. Yes, she gave me to go get a prescription.
Q. Did anything else happen at this doctor's visit?
A. Excuse me?
Q. Did anything else happen at this doctor's visit?
A. No.
Q. Okay. Did she put any restrictions on you?
A. She was going to excuse me for Sunday, to not go in, with a doctor's excuse.
Q. You said she did?
A. Yes. She was -- she did, yes, she did. Excuse me.
Q. Did she give you a written-out prescription on a piece of paper?
A. I told her I didn't need one at that time, because the only one I needed was if I'd miss two or three

[p.150]

days, and I didn't know if I would be feeling well enough to report to work on Monday.
Q. I'm talking about a prescription.
A. Yes, I got a prescription. She wrote out a prescription.
Q. That day?
A. Yes, sir.
Q. All right. And how did she know that you were going to work on Sunday?
A. I told her I wasn't feeling well and I had to be to work tomorrow. And she said that I had a sinus infection, and she said, "It looks like you're exhausted and overworked." That's what she said.
Q. Okay. And she did or did not give you an excuse from work that day?
A. Not that day. She was going to write me one, but I told her I didn't need a doctor's excuse, not unless I missed two

or three days. And I didn't know if I needed -- the thing about it, I didn't know if I was going to be able to report to work Monday or not, so I didn't get it at that time because I didn't know if I was going to report to work Monday or not, because I wasn't feeling well.
Q. She said you should be excused from work on Sunday?

[p.151]

A. Yes, Sir.
Q. Did she say you should be excused from work on Monday, October 1?
A. No, sir, she really didn't say that.
Q. Did she say you should not go to work on Tuesday, October 2nd?
A. No, sir.
Q. Okay. All right. You got the prescription?
A. Yes, sir.
Q. And you left?
A. Yes, sir.
Q. Did you pay?
A. A co-pay.
Q. A co-pay. Did you pay that?
A. I paid some of it.
Q. How much did you pay?
A. I can't recall how much.
Q. Did you drive yourself to the doctor?
A. Yes, sir.
Q. Anybody go with you?
A. No, sir.
Q. What did you do after you left the doctor?
A. Went back home.
Q. Did you talk to your girlfriend that day?
A. I can't fecall. I probably did.

[p.152]

Q. Did you see her that day?
A. I can't recall.
Q. You went home. Did you eat dinner that night?
A. I imagine. I can't recall.
Q Did you go out to dinner, or did you eat at I stayed home if I did eat.
And we're talking about Saturday night, September 29th, 2001, correct?
A. Yes, sir.
Q. All right. Did you leave the house again that night?
A. I can't recall if I did. I don't think I did. I stayed home.
Q. Well, you don't recall, or you stayed home?
A. I stayed home.
Q. You stayed home?
A. {Witness nods head.}
Q. You have a recollection of staying home that wasn't, feeling well, so --
A. But you do have a recollection of staying home that night?
A. (Witness nods head.)
Q. Yes?

* * *

[p.161]

Q. And Ms. Lovato, what was her position?
A. Merchandiser.
Q. Who was Mr. Mirabal's supervisor?
A. Direct supervisor, or -- when you say "supervisor ....
Q. Well, did he have more than one?
A. Well, you're saying "supervisor'" but he was--
Cesar was my supervisor, but Jeff was my immediate supervisor.

Q. I'm talking about Mr. Mirabal's supervisor or supervisors.
A. At that time, like I said, I named all those names before. Jeff Katt, he was there, you know, and Cesar Grado. But like I said, the supervisors changed dramatically.
Q. Okay. Well' let me ask you this: Which supervisor of Mr. Mirabal, if you know, was responsible for his discipline?

MS. MOLINA: Object to the form of the question very vague' ambiguous' overbroad.

A. Was responsible?
Q. (By Mr. Presnell) Correct.
A. It's a chain of command. It works down as far as immediate supervisor and then his supervisor as far as who disciplines, you know.

[p.162]

Q. All right. Well, first of all, do you know? Do you know who imposed any discipline, if any, upon Mr. Mirabal?
A. I don't know if he did get any discipline' if any.
Q. Okay. Mr. Lopez was a merchandiser. Who was his supervisor or supervisors?
A. At the time, Jeff Katt and Cesar Grado.
Q. Okay. And Mr. Sage, who was his supervisors? If you know.
A. I can't recall who his supervisor was.
Q. Was it Mr. Grado?
A. I think at one time, Mr. Grado was Mr. Sage's supervisor at one time.
Q. Do you know that for sure?
A. At one time or another, he was.
Q. You're certain of that?
A. I'm pretty sure.
Q. And Ms. Lovato, who was her supervisor?
A. Jeff Katt, Cesar Grado.

Q. What is the basis for you saying that Mr. Mirabal, Mr. Lopez, Mr. Sage and Ms. Lovato were treated differently?
A. Each one of them missed more days in one year than I probably missed in six and a half. Some missed so

[p.163]

many days they were given a -- they were put on like --I can't think of it -- probation, they were put on probation. And the day after their probation, they would call in sick.
Q. Okay.
A. I missed two days in six and a half years, with a doctor's excuse, one time when my fiancee's son got killed in a car accident, and I got written up for going to his funeral, I mean --
Q. All right, I'm just talking -- I'm not talking about your discipline at this point. I'm asking you about the basis of your knowledge that these four individuals, Mr. Mirabal, Mr. Lopez, Mr. Sage and Ms. Lovato, were treated differently. You said because they missed more days than you?
A. Yes, and they didn't get treated as I did. They didn't get treated as horrific as I did, as malicious as I did.
Q. With respect to missing work?
A. As far as I know, just work attendance. Work attendance, even --
Q. Okay. Let me switch now to your statement that part of the evidence that you're aware of that supports the claim that you were terminated because of your race is that other African-Americans at Coca-Cola Bottling Company

[p.164]

of Albuquerque were treated poorly by Mr. Grado.
A. Yes, sir.
Q. Who are those other African-Americans?

A. James Young, Mike Wilson, and I can't think of the other guy's name. It's been a while.
Q. You think there's one more?
A. Yes' sir.
Q. So you think there's three total?
A. His name is Nate. I can't think of Nate's last name.
Q. Nate. Anybody else?
A. There was another guy that I can't think of his name. He was having problems with Cesar Grado, too. But I may be able to find out his name.
Q. All right. How did Mr. Grado treat Mr. Young poorly?
A. He treated him poorly by switching his days off, switching his route, as far as, Mr. Young even applied for a higher position within the company and never even got interviewed. They claimed they lost his application.
Q. When you say "they," are we still talking about Mr. Grado, or are we talking about someone else now?
A. Well, whoever was in charge of -- whoever was in charge of doing the hiring. I'm pretty sure he had something to do with that.

* * *

[p.193]

Q. Mr. Katt did?
A. Yes, sir.
Q. Okay. Was that before or after Mr. Grado's conversation with you on the 28th?
A. Before.
Q. Okay. What date was that conversation?
A. If I'm not mistaken, I think it was the same day, if I'm not mistaken.
Q. Earlier that morning?
A. I think so, if I'm not mistaken.

Q. All right. And did Mr. Katt call you?
A. Yes, sir.
Q. And what did he say?
A. He asked me if I could work on my day off, and I told him I had plans.
Q. Okay. And then the next call was from Mr. Grado?
A. Yes, sir.
Q. Okay. Except when you've told me today, have you understood all my questions?
A. Yes, sir.
Q. And did you answer the questions truthfully?
A. Yes, sir.

MR. PRESNELL: All right. Thank you very much for your time. That's all I have.

[p.194]

MS. MOLINA: I have one follow-up question.
MR. PRESNELL: Go ahead.

EXAMINATION

BY MS. MOLINA:
Q. Mr. Presnell asked you about, he was asking you some questions about termination because of your race, as listed in the Complaint filed by the EEOC, and Mr. Presnell asked you about what evidence you had. And I think you made a statement to the effect of, no Afro-American was treated like you were for calling in sick. Do you recall that testimony?
A. Are you talking to me?
Q. Yes' I'm sorry.
A. Yes.
Q. Okay. When did you call in sick? What were you talking about when you said that?

A. I called in sick Saturday evening. I called Mr. Katt and reported off from work.
Q. In relation to your conversation with Mr. Grado on Friday, September 28th, when you say Saturday evening, is that the Saturday following that conversation?
A. Yes.
Q. Okay. So you called Jeff Katt; is that right?
A. Yes.
Q. Okay. Tell me about that conversation.

[p.195]

A. I called Jeff Katt and told Mr. Katt that I wasn't feeling well, and I had just come from the doctor's, and I didn't think I would be able to make it to work. He said he didn't have any problems with that, and he told me if for any reason that -- because he was going to go do my stores for me, and for any reason if I felt better in the morning, to give him a call and let him know. I said okay.

MS. MOLINA: Okay. Thank you, sir.

FURTHER EXAMINATION

BY MR. PRESNELL:

Q. What time did you call Mr. Katt on September 29th, 2001?
A. It was late in the evening. I'd say maybe approximately maybe around 8:00, maybe.
Q. Did you talk to him directly, or leave him a message?
A. I talked to him directly.
Q. Where did you call him, at home or on the cell phone?
A. At home.
Q. Was anybody with you on your end of the line?
A. No, sir.
Q. Okay. Did you call Mr. Grado on the evening of September 29, 2001?

[p.196]

A. Yes, sir -- no, not Mr. Grado, no, sir.
Q. Okay. Did you call Mr. Grado at any time on Sunday, September 30, 2001?
A. No, sir.
Q. Okay.
A. I only called my immediate supervisor.

MR. PRESNELL: Okay. That's all I have.

MS. MOLINA: We'll read and sign.

(The deposition concluded at 1:39 p.m.)

EXHIBIT T

EXCERPTS OF DEPOSITION OF CESAR M. GRADO

[p.58]

Q. Okay. And the merchandisers, what do merchandisers do?
A. Merchandisers are essentially stocking positions. They fill shelves with Coca-Cola. They fill displays, racks, coolers.
Q. Anything else?
A. They work in a team environment with the account manager.
Q. What do you mean by that?
A. That they work together. They are in constant communication of what's going on in the accounting.
Q. Okay. Is there one merchandiser -- is there -- is it a one-on-one thing, one merchandiser with one account manager, or is it several merchandisers working with one account manager?
A. What are you asking me, if that's the way I have them teamed up?
Q. With regards to your -- your testimony concerning merchandisers work in a team environment --
A. Right.
Q. -- with account managers --
A. Right.
Q. -- tell me about that. How -- tell me about how they work in a team environment with an account manager.

[p.59]

A. I'm trying to think. I had an account manager teaming up with two merchandisers to cover a route.
Q. How many account managers are under your supervision?

A. Now?
Q. Yeah.
A. I have five.
Q. Five account managers?
A. Yes.
Q. And who are they?
A. I have Bobby Armijo, David Crespin, David Lucero, David Goodman, and Augustine Villegas.
Q. How many merchandisers do you have?
A. I have nine merchandisers.
Q. And who are they?
A. Let's start from the top here. I have Monica Duran, Geneva Romero, Travis Curry, Abraham Angala, Felix Moreno, Toby Saavedra -- Toby Saavedra. How many is that, six? I have Jaime Carrillo, Lesperanza Aragon, and Ray Gallo.
Q. Gallo?
A. Ray, Ray Gallo?
Q. G-a --
A. L-l-o.

[p.60]

Q. Okay. Which merchandisers are teamed up with which account managers?
A. I, I really can't answer that without having a schedule in front of me.
Q. So does the teaming up change with each schedule?
A. Yes, it does.
Q. And how often does the schedule change?
A. Not very often.
Q. How often do you make up the schedule?
A. I, I make it every week.
Q. Every week?
A. Yeah.

Q. Okay. So for this week, who are the merchandisers assigned to the account managers?
A. Without a schedule in front of me, I cannot give you specifies or accurate information.
Q. Okay. How do -- you testified you are the -- the immediate supervisor for merchandisers; is that correct?
A. Yes.
Q. What does that mean that you are an immediate supervisor?
A. It means that any issues regarding scheduling or attendance is brought to me and any requests for

[p.61]

days off.
Q. Anything else?
A. I follow up on merchandising work and attendance.
Q. Anything else?
A. I see the day-to-day activities that merchandisers do.
Q. Anything else?
A. There's a lot more to it, I just can't -- I can't remember everything.
Q. You cannot remember everything that you do as the immediate supervisor for merchandisers?
A. If you give me a specific, I can answer.
Q. Okay. What else do you do? What else are your responsibilities with regards to your duties as the immediate supervisor of merchandisers?
A. Everything. Everything that has to do with merchandisers I'm directly or indirectly involved.
Q. How are you indirectly involved?
A. When I say indirectly, I gather facts and put them in front of HR if we have disciplinary issues. That's indirect.
Q. How do you indirectly get involved?
A. Gather facts.

Q. How do you gather facts?

* * *

[p.210]

for Arturo Lopez, and second page of this performance review numbered 178, that's your signature; is that right?
A. On the bottom, yes.
Q. Yes.
A. Uh-huh.
Q. Okay. So you were signing this as the reviewer. What is -- what is reviewer? What is the role of the reviewer?
A. The reviewer essentially goes over their performance review and explains his marks.
Q. Okay, So do you actually do the review?
A. Yes.
Q. Okay. Okay. So this was Mr. Lopez' performance review for what period of time? According to -- to this, October 1, 2002, to October 1, 2001?
A. Yes.
Q. Is that right?
A. Yes.
Q. Would you look at the section at the -- I'm sorry, I can't read this. This heading under the heading attendance, it's about one, two, three -- five down of the -- of the different headings listed. Do you see that?
A. Yes.

[p.211]

Q. Okay. Attendance, adheres to established hours and schedules, and according to this, Mr. Lopez -- or you gave Mr. Lopez a two. Do you see that?
A Yes.

Q. And a two means what?
A. He needs improvement.
Q. Okay. So what, what was happening with regards to his attendance at the time or during that time period that caused you to rate him as a two?
A. I don't remember.
Q. Okay. The next one, dependability, timeliness in meetings, adherence to policies and procedures, and carrying out assignments as expected, and he also got rated with a two. Do you know what caused you to rate him with a two with regard to the dependability?
A. I don't remember.
Q. Okay. Okay. And then there is some comments, employee, on the second page, number 180, employee's performance areas that require improvement. Do you see that section?
A. Yes.
Q. Okay. The third sentence, "Arturo needs to adhere to established hours and schedules, be at work on time and ready to work." What was that about?

[p.212]

A. I don't remember.
Q. Okay. October 2, the next document, 181, dated October 2, that's a disciplinary notice or a DSN as we refer to them. Is that your signature in the supervisor signature line?
A. Yes, it is.
Q. And it s dated or at least it indicates you signed this on 10-8-01.
A. Yes.
Q. What was this about, this particular DSN?
A. It looks like he did not call or show up to work on October 1, 2001.

Q. Okay. So on the date that his performance evaluation was done -- well, at least the time that review time period expired on 10-1-01 on his performance review on that day he did not show up for work or call his supervisor; is that right?

MR. PRESNELL: Objection.

MS. MOLINA: I will clarify.

MR. PRESNELL: Are you saying his performance review was signed, given to him October 1?

MS. MOLINA: No. I'm going to clarify that.

Q. The review period for his performance, the performance review on document 179 went from 10-1-00 to

[p.213]

10-10-01; is that correct?

A. Yes.

Q. On 10-1-01, the last day of the review time period --

A. Yes.

Q. -- he didn't show up for work or call a supervisor.

A. Yes.

Q. And who -- I'm in the details of violation -- well before we go there, do you have a recollection of -- of the circumstances of Mr. Lopez not showing up to work or calling a supervisor as shown on this details of violation section?

A. No. I do not have a recollection.

Q. Who was the supervisor he was supposed to be calling, if you remember?

A. I don't remember.

Q. Do you have any recollection of who told you that Mr. Lopez, or how you came to find out that he did not show up for work?

A. I just know he did not show up to work, but I don't remember how.

Q. Okay. Okay. The next sentence indicates, quote, "You are being given a copy of a no call no show policy to remind you of this policy." Okay. Who gave

* * *

[p.222]

A. Yes.
Q. And you presented to her the facts in what fashion, what manner?
A. It was in a written form.
Q. But not this written form?
A. It could have been.
Q. Then how did Group C, failure to carry out normal assigned duties end up as the first statement?
A. I could have -- I may have typed that in.
Q. Did you type that in before your conversation with her?
A. No. That's after.
Q. After she --
A. After she makes a decision on the facts.
Q. How did she make the decision on the facts before without having the DSN in front of her?
A. She did have the DSN in front of her.
Q. Another DSN?
A. I don't know if this is the actual DSN that she had in front of her.
Q. There's a possibility there is another DSN out there that you presented to her that contained just the facts, "On Friday" -- from the sentence starting with, "On Friday" and ending "to work the load," you don't know if there's another DSN that contains those

[p.223]

facts.

MR: PRESNELL: Object to the form of the question.

A. I don't know. I don't know if there is or not.

Q. Okay. Let's go to the next DSN. This one is dated April 2, 2001. The one we were looking at, the one dated April -- I'm sorry, it's May 9, 2001, that's the one we just looked at. All right. So we're --

A. What are looking at?

Q. We are now looking at the one dated May 2, 2001. Okay. Number 182 of Exhibit H, this one is on Arturo Lopez. Is it -- was there more than one merchandiser under your immediate supervision named Arturo Lopez?

A. No.

Q. So this is one individual?

A. Yes

Q. And this is -- Mr. Lopez is Hispanic; is that correct?

A. Yes.

Q. This one is, this one is -- the detail of this violation identifies the first line as Group C, failure to carry out the normal assigned duties. Do you see that?

[p.224]

A. Yes.

Q. Okay. And the facts, that's using your terminology, sir, begins with, "On Monday 4-30, you called Jeff Katt to notify him you would need to take some time off from work to sign paperwork for a new home. Jeff agreed to let you off with the understanding you would be back to finish your assigned stores when done. You never reported to work or bothered to call." Do you see that?

A. Yes.

Q. And this was -- you identified this as -- sorry. This was identified -- these two sentences of facts were considered a Group C violation; is that correct?
A. Yes.
Q. Okay. Do you know who determined that these facts were a Group C violation?
A. Sherry Pederson.
Q. Okay. At what point did she determine that this was a Group C violation?
A. When she reviewed the facts.
Q. And she reviewed the facts, how did the facts come to her?
A. In the -- they were given -- I gave her the facts. She decides what it was going to be, so we

[p.225]

typed it up as a Group C.
Q. Okay. How did you give her the facts?
A. I don't remember.
Q. In what form?
A. I do not remember.
Q. Do you have a recollection of whether it was the form, a copy of the form in front of you on Page 182?
A. It could have been.
Q. It could have been?
A. Yes.
Q. Okay. So you presented the facts to her on the form, on written form; is that correct?
A. Yes.
Q. Okay. And then based on your presentation of these facts to her, you're saying then she determined it was a Group C violation?
A. Yes.
Q. Okay. How did the Group C violation end up on the first

line of the details of violation before the facts?
A. I may have typed it.
Q. But do have you an explanation of why it ended up as the first sentence in the -- in the events as you have described that after you presented the

[p.226]

facts to her? Do you have --
A. That is correct.
Q. Do you have any explanation for that?
A. She determined it was a Group C and -- and then we put Group C, failure to carry out normal assigned duties. That was after she reviewed the facts.
Q. And the facts were presented to her on the DSN?
A. They could have been, yes.
Q. Looking at these facts just as you call them facts, and I'm using that term as you use the term, starting with, "On Monday 4-30" going through when done -- actually, going through including the sentence that says, "You never reported to work or bothered to call. Jeff paged you several times with no answer," do you see that?
A. Yes.
Q. Do you know -- could this -- could the incident described in the facts here in this detail of violation, could that have been written up as insubordination?
A. Okay. Ask me that question again.
Q. Okay. Look at the facts, okay? I'm looking at the details of violation on Page 182.
A. Yes.

[p.227]

Q. Okay. Look at all the facts, starting with -- starting with, "On Monday 4-30" and going through "Jeff paged you

several times with no answer," do you see that?
A. Yes.
Q. Could those -- could that incident or incidents have been written up as an insubordination?
A. Could have been.
Q. Why wasn't it?
A. Because I --
Q. But why?
A. I don't know.
Q. Who would know?
A. Sherry Pederson.
Q. Okay. Then do you agree that that incident could have been written up as insubordination?
MR. PRESNELL: Objection.
A. It could have been.
Q. Okay.
MR. PRESNELL: Doing all right?
THE WITNESS: (Nodding.)
Q. Okay. Let's go to what will be marked as exhibit number or Exhibit Letter I.
(Exhibit I marked for identification.)
Q. Here's Exhibit I, and I want to ask you to

[p.228]

go -- to leaf through the exhibit with me to make sure we both have the same pages. Okay? Page 495, 496, 497, 433, 434, 435, do you have all of those pages?
A. Yes, I do.
Q. Okay. Okay. You, you worked with Brian Esquibel at Coca-Cola; is that correct?
A. Yes, I did.
Q. Okay. His employment with Coca-Cola terminated; is that correct?
A. According to this document, yes.

Q. Do you have any personal knowledge with regard to his termination from Coca-Cola?
A. No, I do not.
Q. What position did he hold, if you know, when his employment terminated?
A. He was a side load driver.
Q. Side load driver?
A. Yeah.
Q. What is that?
A. That is a delivery driver that drives a truck.
Q. Was he -- did he work under your supervision?
A. When?
Q. When he worked as a side load driver?
A. No.

[p.229]

Q. Okay. Did he ever work under your supervision?
A. Yes, I think he did.
Q. What position did he hold when he worked under your supervision?
A. He was a merchandiser.
Q. Who was his supervisor, if you know, at termination?
A. That was Rick Gallegos.
Q. Does Rick Gallegos, is he still working for Coca-Cola?
A. Yes.
Q. What position does he hold?
A. He's a distribution supervisor.
Q. Do you have any information concerning Mr. Esquibel's termination from Coca-Cola?
A. No.
Q. All right. Nobody, nobody has talked to you concerning his termination?
A. No.
Q. Okay. We can put that one aside. Exhibit J.

(Exhibit J marked for identification.)

Q. I have handed to you several pages marked Exhibit J, and we are going to do the same thing with this exhibit. We are going to go through the pages,

* * *

EXHIBIT U

EXCERPTS OF DEPOSITION OF JEFF KATT

[p.22]

required to check in with Mr. Grado at the beginning of the workday?
A. I don't know if they did. Sometimes, but I know for most times it was just me because I would -- if somebody wouldn't check in, I would have to call Cesar several times and let him know that somebody wasn't there. And he would, you know, hear that for the first time, and then he would have to juggle some things around to help make sure that everything got done.
Q. Okay. So if somebody wasn't -- wasn't doing their -- wasn't checking in with you or not responding to your pages, then you would go to Mr. Grado --
A. Correct.
Q. -- as your supervisor?
A. Correct.
Q. How about merchandisers calling in sick? Who were they to contact if they were calling in sick?
A. From my own experience, they always called me. And as far as who else they would call, I'm not 100 percent aware of anything else. But I know from my experience I was called by Arturo or other people directly who was my merchandiser.

[p.23]

Q. Arturo Lopez?
A. Correct.
Q. So you received calls from Arturo Lopez -- calls or pages? I'm sorry.

A. Sometimes he would communicate through a page, and I would call him at that number. And other times he would call my cell.
Q. Okay. So during your employment with Coca-Cola, you received calls from Arturo Lopez telling you that he was not reporting to work because he was sick?
A. Correct.
Q. And then what would you do with that information?
A. I would call Cesar and let him know.
Q. For what purpose?
A. So that we could possibly pull another merchandiser or something on somebody else's route or something, and he would make that decision.
Q. During your entire employment with Coca-Cola, were yon ever told that merchandisers were not supposed to call you if they were going to call in sick?
A. Not that I can remember.
Q. How many times -- do you have a

[p.24]

recollection of how many times Mr. Lopez called into let you know that he was not reporting to work because of illness?
A. I don't know the exact number, but I would say at least three.
Q. How about other people? You said Arturo Lopez and other people.
A. Damien Mirabal.
Q. Mirabal?
A. That might be it.
Q. M-I-R-A-B-A-L?
A. That's it.
Q. Okay. Who else?

A. I'm trying to think of all my merchandisers. I believe Vince Martinez called me. I know Stephen called me one time.
Q. Stephen Peters?
A. Stephen Peters. And I would probably have to look at my merchandiser list to be able to remember the rest. I'm not too clear.
Q. And when Damien Mirabal, Vince Martinez, Stephen Peters called you to report sickness or illness and inability to work, what did you do with the information?
A. I would call Cesar.

[p.25]

Q. So there wasn't anything out of the unusual -- out of the usual with these people calling up and saying, "I'm going to be out sick," with what you would do with the information?
A. The only, I guess, discrepancy that I know was when Steve would call me on that Saturday, I believe it was, to let me know that he wasn't feeling good. And I believe I let Cesar know like the next day or maybe it was Monday, I can't specifically remember, that he had called me. And with the other ones, they were typically during my work time, so I was out and about in the field and I would call Cesar at that time.
Q. So why did you not call Mr. Grado until -- or let him know until Sunday evening or Monday morning with regards to Mr. Peters calling in sick?
A. I believe I did page him once or twice, and I never got a response back, which wasn't uncommon on the weekends. Towards the evening, but I believe it was Monday or something is when I finally got a hold of him. I'm not exactly sure when I spoke to him. It might have been Sunday night. And it was just for convenience sake, really.
Q. What do you mean?

A. I mean just -- it was getting probably

* * *

[p.62]

A. They were going to page in to me.
Q. Page in to you. And then what would you have done with that information, if anything?
A. I would have just made sure they were all there and let them work.
Q. Okay. And then with the revised schedule, was anybody supposed to check in with you?
A. As far as I can remember, no, because I think it was just us three. I can't remember specifically how we re-routed that specific day. So for example, Cesar would not have paged in to me, and I don't believe Ray would have paged in to me. I can't specifically remember, but we would typically talk to make sure we were all out there.
Q. And so you knew that Mr. Grado was out there?
A. Yeah.
Q. As was Mr. Lucero?
A. I don't believe he was out there at that time.
Q. At that time, meaning on Sunday?
A. Correct
Q. And you don't know why?
A. We would just -- I would communicate with Cesar, I mean, and we would call each other to make

[p.63]

sure we were doing specific stores. And I can't specifically remember what happened that weekend with Ray.
Q. So you don't have any recollection of seeing Ray at work at any of the stores on Sunday the 30th?

A. Not that I can remember.
Q. And you don't have any recollection of talking to Ray on the phone, Sunday, the 30th, during the workday?
A. Not that I remember.
Q. And do you have any recollection of Cesar Grado saying anything about Mr. Lucero working that Sunday?
A. That he was working that Sunday?
Q. Yes.
A. No, other than the - I can't specifically remember. I would have to say no, I can't specifically remember.
Q. But you do have a recollection of communicating with Mr. Grado on that Sunday?
A. Yes.
Q. And you were aware that he was covering some of the stores?
A. Yeah.

[p.64]

Q. Okay. That had originally been in Damien Mirabal's route; is that correct?
A. That's correct.
Q. When you spoke with Mr. Peters on Saturday evening, did you -- did you say anything to him with regards to the route already being covered for Sunday?
A. I don't remember specifically if we had that conversation. If I did, it would have been a casual, "The route is covered. Call me if you can make it," type thing. It wouldn't have been anything I specifically remember.
Q. During that weekend, did Mr. -- Saturday or Sunday, did Mr. Grado ever say to you that Mr. Peters' employment had been terminated?
A. I can't remember if it was Sunday or Monday night is when he told me. I believe it was Monday night that he told me that Steve was going to be terminated. And if I just know

the date Steve was let go, that's -- it was the night before, whether that would be Sunday or Monday.
Q. So if Stephen was terminated on October 2nd, it would have been October the 1st?
A. That's right.
Q. And how was it that -- how is it that

[p.65]

Mr. Grado gave you that information about Mr. Peters' employment?
A. It was over the cell phone at night.
Q. Were you working?
A. No, I was home.
Q. Did he call you for that purpose, to let you know about Mr. Peters' employment?
A. I believe we were talking initially about scheduling, what was going to happen that week or that next day, and that's when it came up.
Q. What did he say?
A. I believe I asked, "Well' which route is Steve going to cover?" Or, "Why are we covering route 1," or something like that. And he said, "I think I'm going to terminate him or 86 him," or whatever. What phrase he used, I forget.
Q. "I think I'm going to terminate him or 86 him"?
A. He used the word -- the term 86 from time to time, but I can't remember what he said specifically. It was one or the other.
Q. Do you know what the term 86 means?
A. That means he was going to fire somebody.
Q. Do you know where that number comes from?
A. I have no idea.

[p.66]

Q. Okay. And he said this to you on Monday night?
A. Yes.
Q. Okay. And what did you say, if anything, when he said that to you?
A. I said, "Why are you going to do that?" And I can't specifically remember what he told me. And I said, "You do know he called in, he called in sick to me?" And I said, "I tried to page you." And he kind of paused. He said, "Why didn't you tell me that earlier?" And I said, "I did. I tried to page you."
Q. And then?
A. And that was the end of the conversation pretty much. I think I had said something like -- I can't remember specifically. That was pretty much the end of the conversation at that point.
Q. So be asked you, "Why didn't you tell me that earlier?" and you told him, "I did. I tried to page you"?
A. Um-hum.
Q. Had you told him earlier that Mr. Peters had called in sick, earlier than this conversation with you on Monday?
A. No.

[p.67]

Q. You had not told him?
A. No.
Q. You hadn't discussed Mr. Peters during the workday, Sunday, September 30th?
A. No. No, I did not.
Q. Did Mr. Grado know that Mr. Peters had not reported to work on Sunday, the 30th?
A. No, he did not.
Q. Did he ask you whether he had?

A. No.
Q. Did he even mention Mr. Peters Sunday, September 30th?
A. No, not to my recollection.
Q. Did you have any other conversations with Mr. Grado after that conversation with him on Sunday -- was it Sunday night or Sunday evening?

MR. PRESNELL: Object to the form. Which conversation?

Q. (By Ms. Molina) The Monday evening or night conversation, was it evening or night?
A. It was after work. I think I said it was around 6:00 or something on Monday. It was that conversation.
Q. Monday, October 1st, 2001, around 6:00 p.m.?

[p.68]

A. That's right.
Q. After that conversation Monday at around 6:00 p.m., did you have any other conversations with Mr. Grado concerning Mr. Peters' employment?
A. Yeas. He called me that day, Tuesday, and I can't remember specifically what time. It might have been 8:00 or 10:00, and said -- I believe he said -- he asked, "Where's Steve?" And I said he's at whatever store he was at at the time. And he said, "Call him and tell him to go down to the plant," I believe it was.
Q. Anything else?
A. No, that was it.
Q. When you say 8:00 or 10:00, a.m. or p.m.?
A. A.m.
Q. And did you call Mr. Peters?
A. Yeah.
Q. Did Mr. Grado -- did you have -- did Mr. Grado tell you what he wanted to see Mr. Peters about?
A. No. I don't think he did, no.

Q. Did you ask?
A. No.
Q. Okay. So did you -- and you called Mr. Peters?

[p.69]

A. I believe I did.
Q. Okay.
A. Yeah, I think I did.
Q. Any other conversations with Mr. Grado after that conversation --
A. No.
Q. -- with regards to Mr. Peters' employment?
A. No.
Q. Okay. Did you have any -- do you know whether Mr. Peters went to the plant?
A. Yes.
Q. Okay.
A. Are you asking me how do I know he went to the plant?
Q. Yes.
A. It was either Cesar had asked me to tell him to go down there or -- I forget if Steve called me and told me he was going down there, but I knew he was going down there for the purpose that I could take care of the store in the meantime.
Q. Oh, so Steve communicated with you to ensure coverage for the store he was at in his absence while he was at the plant, is what you're saying?
A. Right.

[p.70]

Q. And did you provide coverage for the store he had been at?
A. I'm sorry?

Q. Did you provide coverage for the store Mr. Peters had been at?
A. Yes.
Q. Okay. Did Mr. Grado ever tell you that Sherry Pederson had terminated Mr. Peters' employment?
A. No.
Q. Have you ever heard of a woman named Patricia Edgar?
A. Just recently.
Q. And you heard about her -- was this through counsel?
A. Yesterday.
Q. Okay. Prior to yesterday, had you heard about -- had you heard of a woman named Patricia Edgar?
A. No.
Q. Did Mr. Grado tell you that Ms. Edgar had terminated Mr. Peters' employment?
A. No.
Q. Based on your conversations with Mr. Peters' was it your -- with Mr. Grado, was it

[p.71]

your understanding that it was Mr. Grado who had fired Mr. Peters?

MR. PRESNELL: Object to the form.

A. That was my understanding.
Q. (By Ms. Molina) Did anybody ever tell you otherwise, that it was not Mr. Grado who had terminated Mr. Peters' employment, anybody with Coca-Cola?
A. With that -- no, not with that specific case, no. The only thing I knew, at some point -- I can't remember when I learned the information -- was that Cesar went off to talk with Sherry about the situation, not necessarily Steve, whether it would be grounds for dismissal, that sort of thing.
Q. So just generally, you knew -- you had knowledge that Mr. Grado would often talk to Ms. Pederson concerning any

particular situation and whether a particular situation was grounds for termination?
A. Right.
Q. Do you know if Mr. Grado ever fired an employee?
A. I always assumed that he was the one firing when I worked there.
Q. So during the time that you worked there,

[p.72]

you were -- you were aware that he had fired employees under his management?
MR. PRESNELL: Object to the form.
A. I assumed that that's what was taking place.
Q. (By Ms. Molina) Why did you assume that?
A. Because like I had mentioned earlier, like he would say, "I'm going to 86 this guy because he's not doing his job."
Q. Is your understanding about -- are you -- you're saying that he assumed --
A. He would interchange like 86, fire, you know what I mean, as far as the words he used.
Q. After Mr. Peters was terminated or fired from his job, did you have any other conversations with Cesar Grado where Mr. Peters' name came up or where Mr. Peters was discussed?
A. With Cesar?
Q. Yes.
A. If they were, they were probably just real vague. I can't remember specifics.
Q. What do you mean, they were vague?
A. I mean just like -- you know, I can't remember specifically. It would be like him explaining to me that he's no longer here or

[p.73]

something like that.
Q. He, Mr. Peters?
A. Exactly, yeah.
Q Did you ask-- did you ever ask Mr. Grado why Mr. Peters wasn't there anymore?
A. Boy, I can't recall right now. I can't remember if I -- I can't recall right now.
Q. Okay. And so these -- so these vague conversations with Mr. Grado concerning Mr. Peters after Mr. Peters was fired, Mr. Grado would try to explain to you why he wasn't -- why Mr. Peters wasn't there anymore?
MR. PRESNELL: Object to the form.
Q. (By Ms. Molina) And again, I don't want to put words in your mouth. What do you recall about these vague conversations concerning Mr. Peters?
A. I cant remember.
Q. Is there anything that would help you remember?
A. Just probably maybe thinking about it for a little bit. You know what I mean? I mean it was a while ago, and I can't remember specifically. I know after the -- after they fired him, Steve had given me a call and informed me that he was no longer working, with Coke, and so there was never

[p.74]

really a mystery with me. I don't think he went into great detail or anything.
Q. He' being Cesar?
A. Cesar, about those conversations.
Q. I'm not following you.
A. As far as like me and how I came to the knowledge that he was fired, Steve told me.
Q. Okay.

A. So it's not like I had to ask Cesar a lot of questions. "Is he here? Why did he get fired?" That kind of thing, I just kind of let it go.
Q. But after Mr. Peters was fired, did you have any other conversations with Mr. Grado concerning Mr. Peters?
A. No. No.
Q. -- What kind of a worker was Mr. Peters?
A. He was an excellent worker.
Q. Did you ever have problems with him showing up for work or --
A. No.
Q. -- performing his duties?
A. No.
Q. What kind of a supervisor was Mr. Grado?
A. He was -- I mean he was a take-charge kind of a manager. And he was on top of a lot of things,

[p.75]

and he pushed it pretty hard.
Q. Pushed employees pretty hard?
A. Um-hum.
Q. Is that a yes?
A. Yes. I'm sorry.
Q. Was there anything about Mr. Grado's conduct as a manager that you ever found to not be appropriate?
MR. PRESNELL: Object to the form.
A. I'd say no.
Q. (By Ms. Molina) Did you ever hear -- were you working at Coca-Cola around April of 2002?
A. Yes.
Q. Did you ever hear about Mr. Grado engaging in any inappropriate behavior in October of 2001 and on February 2002?
A. Did I ever hear of him --

Q. Him engaging in any type of inappropriate behavior?
A. No.
Q. Would you turn to page -- Exhibit G, please, and turn to the page marked EEOC 1-BCI-00195? This is a document entitled Disciplinary Status Notice, dated May 9th 2001, for employee, Arturo Lopez. Would you read the synopsis

[p.76]

of this notice and tell me if you are the Jeff that's mentioned in this notice, please?
A. Where it starts out, "Failure to carry out?"
Q. Yes, sir.
A. "Failure to carry out normal assigned duties. On Friday, Smith's in Edgewood received a load of product. Jeff asked you to work the load on two separate occasions, on Monday and Tuesday, after it sat in the back room all weekend. You did not follow instructions to work the load. This performance is not acceptable, and immediate and consistent improvement must be shown or further disciplinary action will be taken up to and including termination."
Q. Is that you?
A. Yes.
Q. So in May 2001 -- do you have a recollection of this particular incident with Mr. Lopez?
A. Yes.
Q. What happened?
A. On this incident, there was a delivery of a number of pallets. And a merchandiser's normal duty is to take care of all those pallets and put

[p.77]

them out onto the floor. And on this occasion, there was a pallet or two, I can't specifically remember, that was still

wrapped up in the shrink wrap. And I asked him to come back and work it, and he didn't do it. And I asked him again, and he told me he would, and he didn't do it.

Q. And you provided this information to -- to--

A. Cesar.

Q. Okay. And Mr. Lopez was -- what happened? This was a warning; is that correct?

A. Yes.

Q. He received a verbal warning for this?

A. That's right.

Q. So you had instructed him to do a certain assignment; is that correct?

A. That's correct.

Q. Did you ever find out why he didn't do it?

A. Just from asking him, he just said -- he just kind of avoided -- you know, kind of gave me some vague answers like, "Oh' I meant to," or "I was running short on time." I can't remember specifically.

Q. What was the first part of your answer? He was running short of time, and what other answers

* * *

[p.82]

Q. Okay. And Ms. Pederson would also work in doing administrative things?

A. Yeah.

Q. What do you mean by that?

A. Like if there was correspondence or something, I know that she would hand them information. I don't know specifics, what it was.

Q. Correspondence-

A. Like I could see like a notebook or something like that. I just remember her giving information, that kind of stuff. I don't know what specific stuff, what she did, what she gave.

Q. Okay. -- Do you know who she reported to?
A. I don't.
Q. And informing managers, she would also -- or giving information to managers, what do you mean by that?
A. -- I believe she would work in like -- I remember we had like a sexual harassment course one time, I think it was, and she was kind of leading that.
Q. As an instructor?
A. I think she was more the facilitator.
Q. Okay. Would you look at the -- would you turn the page and look at EEOC 1-BCI-00182?

[p.83]

A. Um-hum.
Q. Okay. That's another Disciplinary Status Notice on Mr. Lopez; is that correct?
A. Yes.
Q. Okay. And according to this one, April 30th, Mr. Lopez called you -- is that correct?
A. Yes.
Q. -- to let you know that he would need some time off from work to sign some paperwork for a new home?
A. Correct.
Q. Is that correct? And you agreed to let him off with the understanding that he would be back to finish his assigned stores; is that correct?
A. That's correct.
Q. And he never showed up?
A. Correct.
Q. He never returned to work?
A. That's right
Q. And he never -- you paged him several times; is that right?
A. That's right.

Q. Okay. Did you ever find out what happened with Mr. Lopez on that occasion?
A. I can't specifically remember what he --

[p.84]

what his excuse was. I'm sure we talked. We talked every day, every morning, so I can't specifically remember.
Q. Would you look at the next page, please, page 181, another Disciplinary Statutes Notice for Mr. Lopez, October 2nd, 2001?
A. Okay.
Q. Okay. Are you the supervisor -- were you Mr. Lopez's supervisor at the time this DSN was prepared?
A. Yes.
Q. So on Monday, October 1st, Mr. Lopez didn't show up for work or call a supervisor or call you; is that correct?
A. That's correct.
Q. Okay. Do you know why he didn't call or show up for work?
A. I don't remember. I can't -- I don't know.
Q. And for this, he received another warning; is that correct?
A. That's correct.
Q. He, being Mr. Lopez?
A. Yes.
Q. Okay. Would you turn to page 167 of that

[p.85]

same exhibit? I'm sorry.
A. Okay.
Q. So according to this document, Mr. Lopez was finally being terminated November 26th for no call no show; is that correct?
A. It looks like it, yeah.

Q. Do you have any information about what led to his termination in November of 2001?
A. I can't specifically remember. I know there was a series of events that happened, but I can't remember what exactly he was terminated for. I don't know.
Q. When you say series of events with regards to Mr. Lopez, what do you mean?
A. His last time at Coca-Cola, during that last period is when -- boy, it's kind of a long story. It's where he was working in Edgewood, and I know at that point he got into a car accident. And I believe he took some time off because he was injured. He couldn't work at the time. And I don't know exactly what reason he was terminated for. If that was your original question, I don't know. I thought there could have been a couple of reasons. I don't know.
Q. Did you ever know what the reasons were

* * *

[p.90]

I do not know about specific dates. I do not know about Owen Kelly.

And the question was, "How often did the violation of the attendance policy occur by these employees or any other employee?"

And you said, "I believe a handful of times."
A. That's correct.
Q. Okay. What do you know about -- let's go back to Mr. Lopez, since you were asked about him in your affidavit. Other than what we've already gone over with regards to the Disciplinary Status Notices that I showed you with regard to Mr. Lopez, are you aware of any other times that Mr. Lopez violated the attendance policy?

A. I know just one violation that I know that would probably be in conjunction is when he refused to report in to me after I paged him several times.
Q. Okay. So you had paged him several times on one occasion, and he never called you; is that correct?
A. Correct.
Q. How many times would you say that you paged him?
A. Probably six.

[p.91]

Q. In one day?
A. Probably within a couple of hours.
Q. Okay. And do you recall why you were paging him?
A. Because it was a weekend and my merchandisers would page in to me in the morning at 5:00 am. And if I didn't see their number come up, I knew they weren't at work. So at 5:30 I would start getting nervous and calling; because if they didn't show up, that means I had to either go out there or to reassign people to get the work done.
Q. So after you attempted to or you paged him around six times within a couple of hours, what did you do then?
A. I called my merchandiser, Russell, who was at another store.
Q. For what purpose?
A. To pull up that store that Art was supposed to have started at.
Q. Okay.
A. And I told him or asked him to go over there and get started on it. And I was about to go out there and help him, I believe, and he paged me back and said, "Art's there," that Art's mad. And I don't remember specifically that he was upset, and I

[p.92]

paged him five or six times, and he wasn't going to return my call.
Q. So the information you got was that Art was upset because you had paged him?
A. Yeah. It sounded foolish to me. He should have just simply responded back, but he was just mad that day for whatever reason and decided not to page in with me.
Q. Did you tell Grado about this incident?
A. Yes, I did.
Q. Did you tell him about the incident the day it happened?
A. Yes.
Q. What did you tell Grado about it?
A. I paged Cesar. We talked on the phone. And I let him know what the situation was, that he didn't page in in the morning with me, so I assumed he wasn't out there. I told him, "I sent Russell over there to get started, and he told me he was already there, doing his job, but he was upset for some reason. He's not talking to me." And I think he said he was tired of this shit, is what he said.
Q. Who said?
A. Art said that. That's what Russell told me Art said.

[p.93]

Q. Russell told you that Art said that?
A. Yes.
Q. Okay.
A. And that's when I told Cesar, at that point.
Q. Okay. And do you know if Cesar did anything with regards to the information you gave him?
A. Yeah. I know he said, "Here, let me page him," and he paged him a couple of times. And then he said, "Okay, watch

this." I don't know where he was, but he was typing into his pager.

Q. Who was typing, Cesar?

A. Cesar. He was building him a text message. I don't know where he was doing it from, whether from his office or house. And he read off to me what he was communicating with Art. He said, "Art, you need to call me ASAP, and refusing to do so is insubordination, which can lead to termination." Then he typed in his phone number.

Q. And he was telling you this as he was doing it?

A. Yes.

Q. Okay. And do you know if Art responded to that page?

* * *

[p.98]

A. Yes.

Q. Who was there?

A. There was one person with the investigator. I don't remember his name.

Q. Okay. Any EEOC employee?

A. Yes.

Q. Was there anybody from Coca-Cola with you?

A. Sherry Pederson, I believe, was there.

Q. Okay. And at the time that you gave this statement, were you still an employee at Coca-Cola?

A. Yes, I was.

Q. June of 2002? Okay. So when you say, "Yes, he did refuse to work," you're saying that -- you were meaning to say that he couldn't work?

MR. PRESNELL: Object to the form.

Q. (By Ms. Molina) Is that what you're saying?

A. I would -- What I understood the question, "Did he refuse to work his days off?" I was referring to an incident or to the

time we're talking about just with the conversation that was taking place. I didn't, I guess, really define the word refuse as opposed to Coca-Cola's or Stephen's definition or any of that. I just knew there was a time that he did not work because he said he could not work.

[p.99]

Q. Okay. So how would you define refuse in this response to this question?
A. I would define it as, "Was there a time we asked you to work and you said no?"
Q. And you responded yes to that?
A. (Witness nods head.)
Q. That's a yes?
A. Correct, yes.
Q. And that's the incident starting with September 28th, 2001; is that correct?
A. That's correct.
Q. Okay. You were also asked in this by the EEOC investigator on page 3, number 17, the question was: "Have any of the merchandisers under your supervision ever committed the offense of being insubordinate?" And your response was "Insubordinate as far as not coming to work. I am not sure if they were terminated or quit." And you went on to identify Arturo Lopez and Damien Mirabal. Do you see that?
A. Yes.
Q. And the names appear on the following page?
A. Yes.
Q. Okay. Why did you give -- why did you

[p.100]

identify Arturo Lopez and Damien Mirabal as being insubordinate as far as not coming to work?
A. Because I always assumed when a schedule was made, that was a direction or an order that you were supposed to work that time.
Q. Where did you get that understanding from?
A. From the schedule that was handed out each week.
Q. So you understood that if you were on the schedule, that that was an order to merchandisers to be at work?
A. Yes.
Q. And again, where did you get that understanding from?
A. At the time I just assumed if you're supposed to work, you should show up. I mean I thought that that would be disobeying somebody if you refused to work.
Q. Okay. And you considered that if somebody disobeyed that order, the work schedule, that that would be insubordination?
A. Yeah, at the time, I did.
Q. Has your -- have you changed your opinion about that at this time?
A. I know what the definition of

[p.101]

insubordinate is now.
Q. How do you know that?
A. From yesterday's conversation.
Q. From yesterday's conversation with your counsel?
A. That's correct.
Q. With counsel? At the time -- at the time you felt-- at the time that you gave the EEOC this statement, you identified Arturo Lopez and Damien Mirabal as committing the act of insubordination by not reporting to work; is that correct?

A. Correct.
Q. What is your understanding of insubordination?
A. Now I understand it to be if, at Coca-Cola, if they tell you that phrase, that this is a cause for insubordination or this is a failure to do something, this is an order, and failure to do something is insubordination and can lead to your termination.
Q. Okay. So insubordination -- today your understanding of insubordination is if Coca-Cola tells you that phrase, and the phrase being failure to do something is insubordination, then it's insubordination?

[p.102]

A. Correct.
Q. Anything else?
A. No, that's it.
Q. So what your understanding is today about insubordination and what your understanding was at the time that you gave the EEOC this affidavit, would you say that Arturo Lopez committed the act of insubordination?
A. Now I would say he did not because there's no phrase, I guess, on that schedule that says failure to comply with this is being insubordinate, which can lead to your termination.
Q. How about Damien Mirabal?
A. Same thing.
Q. So what is your -- what is your understanding of why Mr. Peters was fired from his job? Strike that.

At the time, that his - that he was fired from his job, what did you understand to be the reason for his employment to be terminated?
A. Because he refused to work at that time, that day off.
Q. Because he refused to work his day off?
A. That's what my understanding was, Cesar's angle of doing it, you know, like -- because Cesar

[p.103]

had asked him. And for whatever reason, you know, he couldn't do it, and then that's the reason -- that's the reason why, I would say.
Q. That was your understanding at the time of Mr. Peters' termination as to why he was fired?
A. That's my understanding. That's what I thought.
Q. And at the time that you thought that that it was because he refused to work a day off, what were you defining refused as?
A. At the time it was because he had plans -- I mean and just not doing it, not dropping your plans and doing it.
Q. And today what is your understanding of why Mr. Peters was terminated?
A. Today my understanding is he was terminated because Cesar told him that phrase. And just that he couldn't -- that he didn't come in. He refused to do it, I guess, and that was it.
Q. Do you believe that Mr. Peters was insubordinate?
A. In my opinion at the time, I did not think so, no.
Q. Why?
A. Because at the time, Steve had worked a

[p.104]

Saturday or two before that, an extra day, and I felt it was being a little bit unfair to be pushed that hard, for people to keep working six days, and it was a very tough job to do. And it was understandable that somebody would need two days off.
Q. Okay. You mentioned earlier, when I had asked you about Ms. Pederson and her responsibilities and duties as you understood them, you said she had to some extent been involved in training on sexual harassment; is that correct?
A. Yes.

Q. So as an employee at BCI, you received training on sexual harassment; is that correct?
A. That's correct.
Q. Did you receive any other kind of training dealing with employment discrimination?
A. Not that I can remember off the top of my head, no.
Q. Did you ever receive any training on employment discrimination based on a person's race?
A. If I did, it was probably in that video that they showed us. I can't specifically remember -- I'd have to say I don't know for sure.
Q. Do you have an understanding, Mr. Katt, of

[p.105]

what race discrimination in employment is?
A. I think I have a pretty vague understanding.
Q. Okay. What is your understanding?
A. That if you make a decision to affect someone's employment or their status based upon their race and not on the facts, that that would be racial discrimination.
Q. Have you ever -- did you ever hear of anyone at BCI ever -- ever use any derogatory or make any derogatory remarks concerning a person's race?
A. I'd have to say no, not that I know of, 100 percent, no.
Q. What do you mean, not 100 percent?
A. I would just say -- I mean I worked in kind of a loose environment sometimes where -- I mean people talked a lot, and sometimes things just went in one ear and out the other and you didn't really pay attention to everything.
Q. What do you mean by a loose environment?
A. Like there would be people in my position and other positions that would just talk freely, I mean talk about anything, and nothing that I would ever remember that would be significant.

* * *

[p.118]

A. There was a time that was pretty similar, where we were going to be short a merchandiser, and it was going to run into the same situation where I had to ask someone to work a sixth day. And Cesar had given me a call on the phone and said, "I need for you to have Monica work one of those two days off that she has. Tell her she can pick one of the days." So I called up Monica, and I said, "We need -- we're going to be short. I need for you to work one of those days." She was having a birthday that weekend, and she wanted both those days off pretty badly. And she told me which day it was that she wanted off. And I said okay. I called up another merchandiser to juggle some things, and she called me right back and said, "No, I want to switch it to the other day." And I said, "Okay," and that was pretty much it. Then I guess continuing on, she never showed up that weekend that she, said she was going to work that day, and I paged her several times to come in. And I informed Cesar that she didn't show up.

Q. Okay. And what did Cesar tell you, or did he ask you anything about Ms. Lovato and her not

[p.119]

showing up for work?

A. No, he didn't really say anything specific. I mean, "Ask her why she didn't show up," or anything like that. I just told him I paged her several times and she never called me back, and I went and pulled out one or two of the stores that was assigned to her.

Q. Did Mr. Grado -- with regard to Ms. Lovato, did he ever say anything to you with regards to, "You can't force an employee to work a day off?"

A. That happened later that week, after that weekend. I got a call, I believe it was from Martin at first; and then I got the same conversation with Cesar. And they asked me that question, "Did you make her work one of her days off?" And I said, "I just did what you asked me to do." He said, "We needed her to work one of those two days." And I asked her to work one of those two days. And he said, "You can't make somebody work one of their days off."
Q. Who told you?
A. Cesar.
Q. So who asked you if you had made her work?
A. Martin Aranda.

[p.120]

Q. Martin Aranda asked you --
A. Yeah.
Q. -- "Did you make her work?" And you said --
A. I said the same thing I told Cesar. I said, "You guys asked me to have her work one of those two days, so I called her up and said she had to work one of those two days."
Q. And then he said, "You can't make somebody work on their day off"?
A. Right.
Q. So do you know what happened to Ms. Lovato's employment?
A. I know that she ended up coming back to work after missing those days. And then I think she quit for a temporary period, I don't know specifically. And from what I understand, Don Bateluna talked her back into coming to work, and she did for maybe the rest of that week and then she quit again.
Q. Is Ms. Lovato African-American?
A. No.
Q. So she -- after she didn't show up for work that week,

then she returned back to work?
A. Yes.

[p.121]

Q. She came back to her -- do you know whether her employment had been terminated during that week?
A. From my -- I don't know for sure.
Q. What is your understanding?
A. My understanding is that no, it wasn't terminated.
Q. Okay. And then she came back to work at Mr. Bateluna's request?
A. That's what I had heard, that he had a conversation with her and talked things out. And I remember he even mentioned something in a Friday meeting about like talking about merchandisers and that sort of thing.
Q. So it was -- it was brought up in a meeting on a Friday with merchandisers concerning her return to work?
A. No. I can't specifically remember how that conversation played out. I just remember that I heard something from Don, that he had talked to her. And I can't remember. There was one other person who told me about that, but I can't remember specifically.
Q. And do you know whether she did come back to work?

* * *

[p.62]

Q. That's what he told you direct evidence meant?
A. Right.
Q. The next sentence, "I have never heard of Mr. Grado or any other employee at Coca-Cola use racially derogatory remarks." Okay? Are you there?
A. Yes.
Q. Okay. You have never, according to this statement, you

have never heard of Grado making or using racially derogatory remarks, is that correct?
A. Right.

Q. And this is concerning Peters or any other African-American employee at Coca-Cola?
A. Correct.
Q. Had you ever heard Grado -- I know you've said, and this says, that you never heard of Grado making or using racially derogatory remarks. Had you ever, yourself, heard Grado make racially derogatory remarks?
A. I mean there was a time where -- and my memory is not 100 percent on this -- it may have

[p.63]

happened.
Q. Tell me about that.
A. It was in the morning, and it was after Steve had been fired. And I was driving to work or at some location, and I was on the phone with Cesar. And I forget the conversation, how it went. And my memory isn't 100 percent clear, but it was something to the effect of, "Did you hear Steve is trying to sue me," or sue Coca-Cola, I forget which one. And I said -- I didn't really say much. I was just trying to stay out of the whole thing. And then there was -- after that he may have used a racially derogatory remark, but I'm not 100 percent sure that he did.
Q. What remark is that?
A. That he would have called him an N word or a work like that would have been racially derogatory.
Q. What do you mean by the N word?
A. Nigger.
MR. MOODY: Or word like that, was that your testimony, Mr. Katt?

THE WITNESS: Correct. And like I said, I'm not 100 percent sure of that. I can't remember -- it was a rough day, and I had other

p.64]

things on my mind. And we had that conversation, and for some reason that sticks in my head. But I can't be 100 percent sure of exactly what was said.

Q. (By Ms. Molina) Did you share this information with anyone at Coca-Cola or counsel?

A. No.

Q. Did you ever tell Mr. Presnell that you -- that Mr. Grado may have used the N word?

MR. MOODY: Or something like that.

Q. (By Ms. Molina) Or something like that or another racially derogatory term when referring to Mr. Peters?

A. No, I never told him.

Q. Did he ever ask you whether you had ever heard anybody use racially derogatory remarks?

A. Yes, he asked me.

Q. He asked you. And why did you not tell him?

A. Just because I wasn't 100 percent sure. I mean we had a conversation -- I mean if you're not 100 percent sure of something, don't talk about it. If it's not fact, if it's not clear -- I mean it was years ago, and we -- you know, I couldn't remember everything that happened years ago. And if it's not a fact, don't bring it up. Do not volunteer

[p.65]

information if you're not 100 percent sure, and I'm not 100 percent sure.

Q. This is a conversation that you had with Mr. Presnell?

A. Correct.

Q. So in response to his question of whether you had heard any racially derogatory remarks being used, how -- did you ever even start explaining to him what you believed you may have heard?

A. I don't think I did. I mean I just didn't want to -- that's a pretty serious word to say. I didn't want to volunteer it if I wasn't 100 percent sure.

Q. And who told you not to volunteer it if you weren't 100 percent sure?

A. Mr. Presnell.

MR. PRESNELL: Object to the form. He didn't say that.

A. Mr. Presnell.

Q. (By Ms. Molina) Mr. Presnell told you if you're not 100 percent sure --

A. Not to that specific comment. That was prefaced to this meeting. If you're not 100 percent sure of something, don't' try to dig everything up. Make sure you just explain the facts that you know

* * *

EXHIBIT V

EXCERPTS OF DEPOSITION OF ORAN SAGE

[p.22]

your direct supervisor is the person who made the decision to issue the notice?
A. No.
Q. That's not your understanding?
A. That I don't know.
Q. You don't know?
A. No.
Q. Okay. Then have you ever been told that somebody else other than Mr. Lucero may have made the decision to issue this notice to you?
A. No.
Q. And do you know whether -- again, I'm on Exhibit BB. Do you know whether there was anyone from the Human Resource Department present when you received this notice?
A. At this time, no.
(Exhibit CC marked for identification.)
Q. (By Ms. Molina) Okay. I'm handing to you what's been marked as Exhibit CC. Do you recognize this document?
A. Yes.
Q. Okay. What is this?
A. This is also a written warning on attendance.
Q. Okay. And this was a Disciplinary Status

[p.23]

Notice issued June 30th of 2000; is that correct?
A. Yes.

Q. Okay. And the Details of Violation with regards to this notice indicates that you had had eight separate incidents of absences within a six-month period; is that correct?
A. Yes.
Q. Okay. Do you know whether these eight incidents on Exhibit CC were different from the incidents on Exhibit BB or in Exhibit BB?
A. No' I don't.
Q. Okay. Why do you think that you received this notice, Disciplinary Status Notice, on June 30th with regards to these eight separate incidents of absences?
A. Can you repeat it?
Q. Why do you think you got this notice, Exhibit CC?
A. Out of compliance with the attendance policy.
Q. Okay. Because you missed eight -- you had eight absences within a six-month period?
A. Correct.
Q. Is that a policy, company policy?
A. I'm unclear on the question.

[p.24]

Q. Do you know whether the company, BCI, whether it's a policy that if you have eight separate incidents of absences within a six-month period, you receive a Disciplinary Status Notice where you're written up for those incidents?
A. That again, I'm not clear on the amount of days.
Q. So you don't know whether this -- whether at the time that you got this notice, whether it was a policy, it was against company policy to do what you had done on this -- as indicated in the Details of Violation that resulted in you receiving this notice? In other words, you don't know if that was company policy supporting the person who made the decision issuing this notice to you?

A. Correct. You know, to my knowledge it's only five days, and here I had eight.
Q. Okay. So at the time, to your knowledge, it was if you had five incidents of absences, you were to receive the DSN?
A. That I don't know.
Q. And you don't know whether, the company policy was if you had eight incidents of absences, you were to receive a DSN?
A. Correct.

[p.25]

Q. You don't know that?
A. I don't know that.
Q. Okay. What were these incidents? Just generally, do you have a recollection of what caused you to have eight absences during that time period?
A. Not really.
Q. You really don't?
A. It could be sick. It could be personal.
Q. The Details of Violation section of this DSN indicates that further incidents will result in further disciplinary action up to and including termination, per attendance policy. Do you see that?
A. Yes.
Q. Okay. And then in June of 2000 you received a written warning for the eight separate incidents of absences; is that correct?
A. That's this one, yes.
Q. We're on Exhibit CC.
A. Right.
Q. So far eight separate incidents of absences within a six-month period, you were issued a written warning, and that's the DSN; is that correct?
A. Yes.

[p.26]

Q. Okay. And then, according to this document, also, Exhibit CC, you had previously been warned; is that correct? Do you see the section that reads, "Previous warnings to employee," and it indicates, "Yes"? Do you see that?
A. Yeah, I see that, but I don't recall a verbal warning. I may have.
Q. Okay. Well, according to this exhibit the next line indicates that a verbal coaching session occurred on April 4th, 2000. Do you see that?
A. Yes.
Q. Okay. Do you have a recollection of a verbal coaching session at that time or on that date?
A. Not really, no.
Q. Do you know what a verbal coaching session is?
A. Yes, I do.
Q. What is that?
A. It's where a supervisor or management asks what the problem is, how can it be corrected, you know, gives you a warning of your situation within the policy.
Q. Okay. And this is BCI's policy; is that

[p.27]

correct?
A. Yes.
Q. Not just bulk drivers' policy?
A. Correct.
Q. Okay. And you don't have a recollection of a verbal coaching session?
A. Well, it says here I had one, so I don't remember the actual incident, no.

Q. Okay. All right. And you signed this? At least your employee signature appears towards the bottom of the document. You signed this July 3rd 2000; is that right?
A. Yes.
Q. Okay. And you, didn't make any indication on this document that you disagreed that you had had a verbal coaching session; is that right?
A. No.
Q. Now, let's go back to the Details of Violation of Exhibit CC. The middle of the paragraph reads: "Further incidents will result in further disciplinary action up to and including termination, per attendance policy." Do you see that?
A. Yes.
Q. And again, did you know what the

[p. 28]

attendance policy was at the time that you were issued the DSN?
A. No.
Q. Okay. And then go back to Exhibit BB, please. Exhibit BB is the seven total incidents year to date totaling 11 days. Do you see that?
A. Yes.
Q. Okay. And we've talked about that DSN; is that correct?
A. Yes.
Q. Okay. And so you had seven incidents with respect to attendance in -- that were noted on a DSN dated November 10th, 2000; is that right?
A. Yes.
Q. Okay. Do you know whether the attendance -- the attendance listed in Exhibit BB is different -- the attendance issues discussed in the Details of Violation of Exhibit BB are different than the incidents of absences discussed in the Details of Violation section of Exhibit CC?

A. No.
Q. Is it the same kind of stuff?
A. Yes.
Q. You were absent from work?
A. Yes.

[p.29]

Q. Okay. And in November, even though you had been told that if you had any further incidents -- in June you had been told that if you had any further incidents of absences, your employment could be terminated; is that correct?
A. Correct.
Q. Okay. November 10th, you had -- by November 10th you had more incidents of absences; is that correct?
A. Yes.
Q. Okay. But you weren't terminated. You received a written warning; is that correct?
A. Correct.
Q. Okay. And on Exhibit BB in the Details of Violation section, it indicates in the middle of the Details of Violation section it reads: "Noncompliance with the attendance policy will result in further disciplinary action up to termination." Do you see that?
A. Yes.
Q. Okay. So then we go to Exhibit J, page 291. So on November 24th you had an incident where you, according to the DSN, left your job assignment without notifying a supervisor. Do you see that?
A. Yes.

* * *

[p.30]

Q. Okay. Was that an absence that they were saying you were absent from work?
A. No.
Q. Why not?
A. I was at work that day.
Q. Okay. But you left work, according to this DSN?
A. Yes.
Q. Okay. And according to the statement from Steve Jugan that you had no knowledge existed in your personnel file up until yesterday, when counsel for Defendant showed it to you, you refused to reload and told Jake that you had things to do and proceeded to leave without your supervisor's approval, according to the document by Mr. Jugan; is that correct?
A. That was -- that wasn't -- I'm getting confused here. Yes, that's correct.
Q. And you weren't terminated on November 24th; is that correct --
A. Correct.
Q. -- for your conduct? You received a three-day suspension; is that correct?
A. Correct.
Q. Okay. And then in the section, "Previous

[p.31]

warnings to employee," we're still on page 291 of Exhibit J, it indicates no. But then there's a handwritten explanation in there that reads, "Discussed same issue on 11/14 with Jake present."Do you see that?
A. Yes.
Q. Do you know what that's about?
A. Yes, Ido.
Q. What is it?

A. I had finished my route that day. And when I went in, Jake, our supervisor, was putting a load on a truck. Out of normality, you know, he helps us out, so I thought he was taking out that load. There was nothing else, so I left --
Q. With regards to the November 14th incident that you've just testified about, were you -- did you receive a DSN for that?
A. I believe I did.
Q. Do you have a recollection of actually seeing a Disciplinary Status Notice for that incident of November 14th?
A. I don't quite recall, no.
Q. With regards to the November 14th incident, do you have any recollection of anyone telling you that any further incidents of these

[p.32]

types, of the November 14th and November 22nd incidents, would result in termination?
A. No.
Q. Has your employment -- strike that.

Have you received any other write-ups for attendance or absences or for anything else with BCI other than what I've shown you?
A. That I'm not too sure of, no.
Q. Because you don't know what's in your personnel file?
A. Correct.
Q. Okay. Did your employment ever terminate as a result of any of the DSNs that we've talked about?
A. No.
Q. Okay. So there hasn't been a break in your employment where yon were fired as a result of these DSNs and then you were brought back?
A. No.

Q. As an employee at BCI, do you go through training on the subject of employment discrimination?
A. Yes.
Q. Okay. When was the last time you had any training on the subject of employment

[p.33]

discrimination?
A. That I don't recall.
Q. Okay. Was it in the last -- in the last year? And I'm talking about in 2003.
A. That I don't recall, either.
Q. Have you -- in this training, do you have a recollection of ever getting any training on the issue of race discrimination?
A. That I don't recall, either.
Q. Do you have any recollection, to the extent you can -- I know you can't recall when you've had the training on employment discrimination. Do you recall who the trainer was?
A. No, not at the time, no.
Q. Has anyone -- has anyone from the local plant or the local facility here in Albuquerque talked to you about any problems at Coca-Cola with regards to management?
A. No.
Q. Has anybody from the Phoenix office talked to you?
A. No.
Q. Has anybody from the BCI office out of Los Angeles talked to you?
A. No.

[p.34]

Q. Has anybody ever talked to you about any problems at all that you may have experienced during your employment at

Coca-Cola?
A. Can you rephrase?
Q. Has anyone from BCI, Los Angeles, Phoenix or the local facility or anybody associated with BCI talked to you about any problems, asked you whether you've ever had any problems in your employment at BCI?
A. You'll have to be more specific to the content of the question. You know, there's been times where they've asked me if I've had problems out on the route, if I've had problems with equipment, that type of thing, but . . .
Q. Has anyone asked you whether you've had any problems with regard to Mr. Grado, Cesar Grado?
A. No.
Q. Do you know if anybody has -- anybody has -- strike that.
Since the filing of -- or since the termination of Mr. Stephen Peters, has anybody talked to you about problems at Coca-Cola?
A. Just --
MR. PRESNELL: Object to the form.
A. No.

[p.35]

Q. (By Ms. Molina) Okay. Do you know whether Mr. Cesar -- whether Cesar Grado ever had a meeting with Human Resources concerning his management style or his management of employees?
A. No' I don't know.
Q. You don't know?
A. That I don't know.
Q. Okay. What is your understanding or do you have an understanding of what the company policy is with regards to insubordination by employees?
A. I have some idea. I'm not too clear on it, no.
Q. What is your idea?

A. Total refusal of not taking -- not following orders.
Q. Anything else?
A. No.
Q. Where have you gotten this understanding about what insubordination is?
A. That I don't recall on where I got the information.
Q. Okay. You've worked for BCI for ten and a half years?
A. Correct.
Q. Okay. Then what is the -- what is your

[p.36]

employer's policy with regards to insubordination?
A. I'm not too clear on that subject.
Q. Would you look back at Mr. Jugan's statement on page 292 of Exhibit J?

According to Mr. Jugan, in the middle of this statement he indicates, "Kelly refused to reload and told Jake that he had things to do and then proceeded to leave without his supervisor s approval." Do you see that?
A. Yes.
Q. Okay. Using your own definition, would you have committed insubordination by refusing to reload?
A. Yes.
Q. Were you ever written up for insubordination?
A. No. I was never ordered, like he says I was.
Q. Okay. But based on what Mr. Jugan said in this statement, based on what he said in here, you would have been written up for insubordination; is that correct?

MR. PRESNELL: Object to form.

Q. (By Ms. Molina) According to your definition of insubordination?

[p.37]

MR. PRESNELL: Object to form.

A. Yes.

MS. MOLINA: We're going to take a quick break, and I'm going to go over my notes. I'm pretty much close to being done.

(Recess taken.)

MS. MOLINA: We're almost done.

THE WITNESS: Okay.

Q. (By Ms. Molina) Have you ever talked to Mr. Peters on the phone concerning Coca-Cola? And more specifically recently, like within the last three to four months?

A. Yes, I talked to him on the phone. The time frame, I'm not too clear on.

Q. Did he call you or did you call him?

A. I believe -- I think he called me.

Q. Okay. And do you remember what he asked you?

A. Honestly, no, I don't.

Q. Well, do you remember him asking you whether you ever had any problems with anybody at Coca-Cola?

A. No.

Q. You don't recall?

A. I don't recall.

EXHIBIT W

Smith's
6125 4th St. NW
ALBUQUERQUE, NM 87107
505-344-3509

Rx No. 6784561

Peters, Stephen
208 Fentiman SW
Albuquerque, NM 87105
(505) 452-2593
Dr. Grady, D.O., M.D.
Nasonex 50MCG Nasal SUS SCHE
NDS: 00085-1197-01
QTY: 17
Use two sprays in each nostril daily

Fill Date: 9/29/2001
TX# 1255068

Price $59.89
Pay $15.00

PCS TP REF# 911375

PRESBYTERIAN
Healthcare Services

Rio Bravo (505) 462-7777

Return to School or Work

Name: Stephen Peters

is my patient and has been under by care from 9/29/01 to ___
and is able to return to school/work on 10/1/01.

Dr./s/_____
Date: 10/3/01

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ-02-1644
JOB/RHS (ACE)

[Filed March 31, 2004]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, d/b/a PHOENIX COCA-COLA BOTTLING COMPANY and COCA-COLA BOTTLING COMPANY OF ALBUQUERQUE, Defendant.	)

SUPPLEMENTAL DECLARATION OF SHERRY PEDERSEN

1. I am Sherry Pedersen. I am currently employed by BCI Coca-Cola Bottling Company of Los Angeles ("BCI") in the position of Employee Relations Manager. In September and October of 2001, I held the position of Senior Human Resources Administrator. This declaration is based upon my personal knowledge, and/or my review of the official BCI business records referenced herein. My job responsibilities include maintenance of personnel files for all employees working at BCI's Albuquerque, New Mexico facility.

2. BCI time records, attached as Exhibit 1 hereto, indicate that Arturo Lopez's last day worked for BCI was Monday, November 19, 2001. This corresponds with the Resignation Statement completed by Cesar Grado on November 28, 2001 (Exhibit 2 hereto), which indicates that Mr. Lopez had not returned to work and had accepted employment elsewhere, and also that the Termination Notice completed for Mr. Lopez, wherein I listed his date of termination as November 23, 2001. See Exhibit 3 hereto. Because Mr. Lopez had apparently quit and accepted employment elsewhere, he was deemed to have voluntarily abandoned his job. This is standard practice when an employee quits without notice. Although BCI reserves the right to invoke its "no-call, no-show" policy to involuntarily terminate employees who fail to come in for three days without notifying a supervisor, this policy is typically not applied in circumstances of obvious job abandonment. I do not know why a second Resignation Statement was completed in December by Mr. Grado with respect to Mr. Lopez's termination. From the dates on the Termination notice, it appears that it took a while to complete all the necessary administrative processes necessary to remove Mr. Lopez from BCI's employee rolls. However, BCI records for Merchandisers for 2001 and 2002, which were produced to the EEOC in this matter, definitively show that Mr. Lopez never returned to work at BCI after November 19, 2001. He was designated as ineligible for rehire and thus could not have returned to work for BCI even if he had wished to do so. See Exhibit 3 hereto.

3. Mr. Peters' personnel file contains an Employee Acknowledgement Form signed by Mr. Peters, stating that he received and understood copies of BCI's equal employment opportunity and sexual harassment policies. See Exhibit 4 hereto.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of March, 2004.

/s/_____
SHERRY PEDERSEN

EXHIBIT 1

Cost Per Case Recap
DSM CESAR GRADO
Week Ending 11-25-01

Cases Per Hour	64.86
Weekly Cases	40930
CPC	0.183

Merchandiser Name	**Mon.**	**Tues.**	**Wed.**	**Thurs.**
David Garduno	13.65	5.40	11.97	7.93
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	12.73	10.17	0.00	61.85
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	32	29.85		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	8		0
	Hrly Rt	**Pay**		
	9.	762.975		

Merchandiser Name	**Mon.**	**Tues.**	**Wed.**	**Thurs.**
Mark Sedillo	13.97	13.10	12.75	13.88
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	11.38	10.35	0.00	75.43
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	32	43.43		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	8		0
	Hrly Rt	**Pay**		
	9	946.305		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
Barry Lafaver	15.93	13.15	12.48	3.42
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	0.00	0.00	11.33	56.31
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	32	24.31		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	8		0
	Hrly Rt	**Pay**		
	9	688.185		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
Monica Lovato	0.00	0.00	13.00	5.00
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	10.50	0.00	0.00	28.5
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	28.5	0		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	0		0
	Hrly Rt	**Pay**		
	8	228		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
Branden Grindel	13.18	13.75	11.42	0.00
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	0.00	11.38	9.35	59.08
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	32	27.08		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	0		0
	Hrly Rt	**Pay**		
	9.25	671.735		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
Arturo Lopez Jr	8.57	0.00	0.00	0.00
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	0.00	0.00	0.00	8.57
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	8.57	0		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	0		0
	Hrly Rt	**Pay**		
	9	77.13		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
Mathew Montoya	0.00	0.00	13.56	6.75
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	15.95	0.00	6.62	42.88
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	40	2.88		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	0		0
	Hrly Rt	**Pay**		
	8	354.56		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
Ernesto Gutierrez	9.93	0.00	13.20	7.48
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	0.00	0.00	0.00	30.61
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	30.61	0		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	0		0
	Hrly Rt	**Pay**		
	9	275.49		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
James Gallegos	0.00	0.00	0.00	0.00
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	9.97	9.15	9.47	28.59
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	28.59	0		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	0		0
	Hrly Rt	**Pay**		
	8	228.72		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
David Lucaro	13.96	13.17	12.77	3.23
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	0.00	0.00	9.08	52.23
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	32	20.23		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	8		0
	Hrly Rt	**Pay**		
	9	633.105		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
Leonardo Baca	0.00	0.00	12.87	8.98
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	12.02	12.73	5.85	53.50
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	32	21.5		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	8		0
	Hrly Rt	**Pay**		
	9	650.25		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
Greg Sullivan	15.83	11.65	0.00	0.00
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	12.18	11.07	8.70	59.63
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	32	27.63		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	8		0
	Hrly Rt	**Pay**		
	9	733.005		

Merchandiser Name	Mon.	Tues.	Wed.	Thurs.
Vincent Martinez	13.4	13.65	14.27	0
	Fri.	**Sat.**	**Sun.**	**Ttl Hr**
	13.18	10.15	9.27	73.90
	Reg Hrs	**OT Hrs**		**Vac Hrs**
	32	41.9		0
	Sck Hrs	**Hol Hrs**		**Lt Duty**
	0	8		0
	Hrly Rt	**Pay**		
	9	925.65		

Hours Cost	Ttl Hr	Reg Hrs	OT Hrs
	631.1	392.27	238.8
	Vac Hrs	**Sck Hrs**	**Hol Hrs**
	0	0	56
	Lt Duty	**Hrly Rt**	**Pay**
	0	0	7175.11
Mileage Cost			296.77
			7473.88

EXHIBIT 2

RESIGNATION STATEMENT

Name: Arturo Lopez Date: 11-28-01

To: Human Resources Department

I, _____, am voluntarily resigning my employment at Phoenix Coca-Cola Bottling Company as of (date) for the following reasons:

I have discussed my resignation with my supervisor, and I am voluntarily resigning.

I am____ am not____ leaving my position to accept a position with another company.

Employee Signature:
Date:

Supervisor's Comments:

Arturo has not returned to work or called anyone for over a week. He has accepted employment with Smiths.

Supervisor's Signature: /s/_____
Date: 11-28-01

EXHIBIT 3

EMPLOYEE TERMINATION NOTICE/PROPERTY CLEARANCE CHECKLIST
IN CASE OF INVOLUNTARY TERMINATION, CONSULT HUMAN RESOURCES BEFORE COMPLETING THIS FORM.

EMPLOYEE #/SSN: XXX-XX-XXXX

NAME: LOPEZ, ARTURO
POSITION: Merchandiser
FACILITY NAME: Albuquerque
TERMINATION DATE: 11/23/01
TERMINATION REASON: Voluntary
Last Date Worked 11/20/01

REHIRE CONSIDERATION

No. No Notice. No Call No Show 3 days

Input By: SP
Date: 11/28/01

PROPERTY CLEARANCE CHECKLIST

SUPERVISOR: Use list below as a guide to recover all Company property. Sign all items received by placing your initials next to the item under column headed "Cleared By". Fill in N/A (Not Applicable) next to all items not pertaining to employee. Return items to appropriate departments.

I.D./ACCESS CARDS/CG
TIMECLOCK CARD/CG
SAFETY EQUIPMENT/CG
UNIFORMS/CG
PAGER/CG
LIBRARY MATERIALS/CG

I state that I possess no property belonging to the Company, nor any outstanding monies owed the Company.

Employee Signature	Date
/s/ _____ Immediate Supervisor Signature	1-10-02
/s/ _____ Second Level Signature	1-14-01
/s/ _____ Human Resources Signature	1-10-02

EXHIBIT 4

DESERT SUN DIVISION
EMPLOYEE ACKNOWLEDGMENT

This is to acknowledge that I have received copies regarding the following policies, procedures, rules and regulations of Desert Sun Division and fully understand the contents.

I understand that the policies, procedures, rules and regulations contain important information regarding my employment with the Company and my obligation as an employee to adhere to them. I further understand that the Company may change, rescind or add to any policies, benefits or practices described herein from time to time at its sole and absolute discretion with or without prior notice. Material changes will be made known to employees through the usual channels of communication within a reasonable period of time.

I am fully aware that violations of same may result in disciplinary action up to and including termination.

EQUAL EMPLOYMENT OPPORTUNITY POLICY

EQUAL OPPORTUNITY POLICY FOR INDIVIDUALS WITH DISABILITIES' SPECIAL DISABLED VETERANS & VIETNAM ERA VETERANS

SEXUAL HARASSMENT POLICY-10/98

ATTENDANCE POLICY

EMPLOYEE RULES & REGULATIONS

WORKING OFF THE CLOCK

NON-SMOKING POLICY

CODE OF BUSINESS CONDUCT

VEHICULAR ACCIDENT REVIEW AND DISCIPLINARY ACTION

ACCIDENT REPORTING PROCEDURES

WORKER'S COMPENSATION LAW

OCCUPATIONAL SAFETY POLICY

SMALL VEHICLE POLICY

ALCOHOL AND DRUG USE POLICY

FAMILY MEDICAL LEAVE ACT (FMLA)

ANTITRUST COMPLIANCE POLICY

Employee Name (print): Stephen B. Peters
Employee Signature: /s/_____
Date: 1/25/99
Facility Name & Location: Coca Cola Enterprise. Alb NM

EXHIBIT

EXCERPTS OF DEPOSITION OF ORAN SAGE

[p.6]

A. There was only a couple of months that were changes -- you know, company changes, different -- gave me a side load position.
Q. And just generally, how does that differ from the bulk driver position?
A. Bulk is mainly to large grocery store chains. And the side load is convenience stores, Circle Ks, gas stations.
Q. Who is your supervisor currently?
A. Jake Lucero.
Q. Have you had other supervisors other than Mr. Lucero as a bulk driver?
A. I think Jake is our first supervisor. It's mostly been management.
Q. Who is Mr. Lucero's supervisor?
A. That is Martin Aranda.
Q. And do yon know who Mr. Aranda's supervisor is?
A. I think that would be Robin Dotson.
Q. Robin?
A. Robin Dotson.
Q. Okay. Do you know a Coca-Cola employee by the name of Cesar Grado?
A. Yes.
Q. How do you know of him?

[p.7]

A. He's supervisor over sales, merchandisers. That's about it.

Q. Okay. Have you ever worked with him -- I'm sorry' have you ever worked under his management?
A. Yes, years ago.
Q. Okay.
A. A short time.
Q. In what position?
A. I was still -- he was our supervisor for about a two-week period.
Q. Do you work with him now?
A. No, not directly.
Q. Do you work with him indirectly?
A. Very rarely.
Q. Rarely?
A. (Witness nods head.)
Q. Under what circumstances would you work with him?
A. If I can't get ahold of a salesman through paging or a cell phone, I would have to go to him to have him do the communications for me.
Q. Would you please turn to Exhibit -- and these are the exhibits I'm talking about, the exhibit book here, and these are the tabs that

[p.8]

identify the exhibits as A, B, C, D and so on.
A. Okay.
Q. Exhibit J, please. And that exhibit is several pages. And I'm going to direct your attention, please, to the third page of that exhibit, page 291 in the right-hand corner. Are you reviewing it?
A. Um-hum.
Q. Okay. Do you recognize this document?
A. Yes, I do.
Q. This is a Disciplinary Status Notice, right?
A. Yes.

Q. Do you have a recollection of what happened with regards to this incident that resulted in a DSN?
A. Yes, I do.
Q. What happened?
A. Okay. My scheduled day off is Wednesdays and Sundays. This particular incident, Wednesday was the day before Thanksgiving, and the following Monday -- or the Monday before, I was asked to work on Wednesday, So I told the supervisor, "Yes, I'll volunteer to work, but I can only work until 11:00, 12:00 in the afternoon," because we had plans to go

[p.9]

out to Gallup to see my grandmother. And he agreed to this. Okay?

I came in. I ran my normal route. I came back two more times. I picked up two other separate loads, ran those. About 11:30, 11:45, when I finished with the third load, I came in and I called my supervisor, who was Jake Lucero. And I told him, I says, "It's getting to be noon," you know. I said, "What do you want me to do?" And he asked me if there were any other loads still there that needed to go out. And I replied, "Yes," if I'm correct, there were three left or something to this effect. And he told me, he says, "Well, I don't know. Do what you've got to do," he told me. So I took that as the agreement that we had for me leaving at a certain time, it was okay to leave.

And that conversation was very short, and so I left. We left town. And when I came back on Friday after I had done my route, then they showed me this disciplinary paperwork.
Q. "They" being your supervisor?
A. Yes.
Q. And your supervisor was Mr. Lucero?

A. Yes.
Q. So did you agree with this write-up that

[p.10]

you got?
A. No. I thought, you know, the supervisor and I were in a verbal understanding that I could only work until a certain time, and I had arrangements, and no, I didn't agree with it.
Q. Okay. Do you have a recollection of whether anyone from the Human Resource office at your facility was present when you received this notice?
A. If I remember right, Steve Jugan, J-U-G-A-N, I think it is, was present, and he was our manager.
Q. When you say your manager, meaning managers for both drivers?
A. For the sales department over the drivers, yes.
Q. But you were in the sales department?
A. Yes.
Q. What other departments are there other than the sales?
A. Sales, full service, cold drink, and then they get into the office. I don't know too much about that.
Q. Okay. So Steve Jugan was your manager, he was the manager for the sales department?

[p.11]

A. At the time, yes.
Q. At the time, was he, did he work with Human Resources, the Human Resources Department?
A. On disciplinarian, he must have. I do not really know.
Q. Okay. But Mr. Jugan was present when you received this notice; is that correct?
A. Yes.

Q. But you don't know if he was representing the Human Resource Department or if he was there as a manager?
A. He was my manager.
Q. He was your manager?
A. Um-hum.
Q. Who worked with Human Resources at the time?
A. I'm sure it was Steve Jugan and Jake Lucero, manager and supervisor.
Q. Do you know if BCI has a Human Resources Department?
Q. And who works in that department now?
A. Sherry Peters. Kim -- I don't know her last name.
Q. Is that Sherry Pederson?

[p.12]

A. Pederson. Okay.
Q. Okay. At the time you received this notice, who held the position that Ms. Pederson holds now? Who held the position then?
A. There have been so many people going through that department. I don't remember. I don't recall.
Q. Okay. At the time that you received this notice, was it your understanding that BCI was issuing this -- I'm sorry, that Jake Lucero, your supervisor, was the person who was issuing this Disciplinary Status Notice to you?
A. That's kind of unclear to me.
Q. Oh, okay. It's unclear to me, too. Okay. At the time that you received this notice dated 11/24/00, was it your understanding that the notice -- you were suspended -- you were suspended for three days in this notice, that that suspension came from your supervisor, Jake Lucero?
A. Yes.
Q. Okay. Did anyone ever tell you that Jake Lucero was not the person who was issuing the discipline?
A. No.

Q. Okay. Have you ever been told at any time

[p.13]

during your employment at BCI that someone from the Human Resource Department is the person who is actually the person who is disciplining employees and not supervisors?
A. No.
Q. Would you turn to page 292?
A. Okay.
Q. This is a typewritten statement by Steve Jugan; is that correct?
A. Yes.
Q. Have you seen a copy of this prior to today's deposition?
A. No.
Q. Okay. Do you want -- would you please read this and let me know if this is the incident that you have already testified about?
A. Yes.
Q. So this is the incident that resulted in the Disciplinary Status Notice on page 291; is that correct?
A. Yes.
Q. Okay. And you hadn't seen a copy of that statement, sir?
A. Yes, this is actually the one I saw yesterday.

* * *

[p.34]

Q. Has anybody ever talked to you about any problems at all that you may have experienced during your employment at Coca-Cola?
A. Can you rephrase?
Q. Has anyone from BCI, Los Angeles, Phoenix or the local facility or anybody associated with BCI talked to you about

any problems, asked you whether you've ever had any problems in your employment at BCI?

A. You'll have to be more specific to the content of the question. You know, there's been times where they've asked me if I've had problems out on the route, if I've had problems with equipment, that type of thing, but . . .

Q. Has anyone asked you whether you've had any problems with regard to Mr. Grado, Cesar Grado?

A. No.

Q. Do you know if anybody has -- anybody has -- strike that.

Since the filing of -- or since the termination of Mr. Stephen Peters, has anybody talked to you about problems at Coca-Cola?

A. Just --

MR. PRESNELL: Object to the form.

A. No.

[p.35]

Q. (By Ms. Molina) Okay. Do you know whether Mr. Cesar -- whether Cesar Grado ever had a meeting with Human Resources concerning his management style or his management of employees?

A. No' I don't know.

Q. You don't know?

A. That I don't know.

Q. Okay. What is your understanding or do you have an understanding of what the company policy is with regards to insubordination by employees?

A. I have some idea. I'm not too clear on it, no.

Q. What is your idea?

A. Total refusal of not taking -- not following orders.

Q. Anything else?

A. No.

Q. Where have you gotten this understanding about what insubordination is?
A. That I don't recall on where I got the information.
Q. Okay. You've worked for BCI for ten and a half years?
A. Correct.
Q. Okay. Then what is the -- what is your

[p.36]

employer's policy with regards to insubordination?
A. I'm not too clear on that subject.
Q. Would you look back at Mr. Jugan's statement on page 292 of Exhibit J?

According to Mr. Jugan, in the middle of this statement he indicates, "Kelly refused to reload and told Jake that he had things to do and then proceeded to leave without his supervisor's approval." Do you see that?
A. Yes.
Q. Okay. Using your own definition, would you have committed insubordination by refusing to reload?
A. Yes.
Q. Were you ever written up for insubordination?
A. No. I was never ordered, like he says I was.
Q. Okay. But based on what Mr. Jugan said in this statement, based on what he said in here, you would have been written up for insubordination; is that correct?

MR. PRESNELL: Object to form.

Q. (By Ms. Molina) According to your definition of insubordination?

[p.37]

MR. PRESNELL: Object to form.

A. Yes.

MS. MOLINA: We're going to take a quick break,

and I'm going to go over my notes. I'm pretty much close to being done.

(Recess taken.)

MS. MOLINA: We're almost done.

THE WITNESS: Okay.

Q. (By Ms. Molina) Have you ever talked to Mr. Peters on the phone concerning Coca-Cola? And more specifically recently, like within the last three to four months?

A. Yes, I talked to him on the phone. The time frame, I'm not too clear on.

Q. Did he call you or did you call him?

A. I believe -- I think he called me.

Q. Okay. And do you remember what he asked you?

A. Honestly, no, I don't.

Q. Well, do you remember him asking you whether you ever had any problems with anybody at Coca-Cola?

A. No.

Q. You don't recall?

A. I don't recall.

EXHIBIT

EXCERPTS OF DEPOSITION OF JEFF KATT

[p.46]

couldn't work, that he had something planned. Cesar told him, "I'm not asking you, I'm telling you," or something like that, I think he said. I cant remember specifically. And that was pretty much it.
Q. Did Mr. Peters call you and let you know that he had just -- that he had had a conversation with Mr. Grado?
A. Yes.
Q. Okay. How soon after you had talked to Mr. Peters and Mr. Peters told you that he would call Mr. Grado, that he was going to call Mr. Grado, how much time after that phone call did Mr. Peters call you back?
A. Probably within a half hour.
Q. Do you recall whether Mr. Peters said anything else to you during the second phone call on Friday that he had with you?
A. I can't remember, no.
Q. Did you say anything to him concerning what Mr. Grado told him during this phone conversation?
A. I'm sorry. could you repeat that?
Q. Did you tell Mr. Peters anything about what Mr. Grado had said to Mr. Peters during the phone conversation that Friday afternoon?

[p.47]

A. Just other than the fact that what we initially discussed, that Cesar had mentioned that if he didn't work that he could reassign his days off.

Q. You said this to Mr. Peters?
A. That's right.
Q. Meaning that he would -- Mr. Peters would lose his Saturday and Sunday off?
A. That it could possibly be reassigned to like Wednesday and Thursday or something like that.
Q. His days off?
A. Correct.
Q. And those days off that he had earned due to his -- as a result of his seniority?

MR. PRESNELL: Object to the form.

Q. (By Ms. Molina) Is that correct?
A. It was more desirable to be off for Saturday and Sunday for most merchandisers, and that was his opportunity, I guess -- or he had that availability more than anybody on my list, yeah.
Q. Because of his seniority?
A. Right
Q. And Mr. Grado told you that if Mr. Peters didn't work on Sunday, that he would reassign his days off?

[p.48]

MR. PRESNELL: Object to the form

Q. (By Ms. Molina) Is that right?
A. I'm sorry, could you repeat that?
Q. Mr. Grado mentioned to you that if Mr. Peters didn't work on Sunday, that he would reassign his days off?

MR. PRESNELL: Object to the form.

A. No, he didn't a --
Q. (By Ms. Molina) All right. What did Mr. Grado tell you about the days off?
A. He said, "Tell him if he doesn't work that Sunday, since he doesn't have to have Saturday and Sunday off, that I can reassign."

Q. Other than what you've already testified about with regards to your second conversation with Mr. Peters on Friday afternoon, was there anything else that was said between you?
A. No.
Q. Okay. And then did you talk to Mr. Grado at any other time before you spoke with him between 5:00 and 6:00 Friday afternoon?
A. Not that I recall, no.
Q. Okay. So after you spoke to Mr. Peters the second time, what did you do?
A. At that point, just pretty much went on

[p.49]

the daily routine to get everything finished up.
Q. And then what happened?
A. After that, then I spoke with Cesar about, "What are we going to do to get that Sunday taken care of?"
Q. Okay. Did you speak with Cesar on the phone?
A. Yes.
Q. Did you call him or did he call you?
A. I can't remember.
Q. So what was the conversation during that call?
A. It was something to the regard that that Sunday was going to be open and that we were going to have to get it filled.
Q. Did Mr. Grado say anything else about Mr. Peters during that Conversation?
A. Not that I can remember.
Q. Okay. Did Mr. Grado tell you during that conversation that Mr. Peters' employment was terminated?
A. No.
Q. Did anybody tell you that Friday afternoon that Mr. Peters' employment had been terminated?
A. No.

* * *

[p.94]

I telephone conversation?
A. I didn't say anything.
Q. Did you tell me that you could overhear the person on the other end of the line?
A. No.
Q. Did I discuss that telephone conversation with you after it concluded?
A. No.
Q. Did you ask me about that telephone conversation after it concluded?
A. No.
Q. Did you tell me after the telephone conversation concluded that you had overheard it?
A. No.
Q. One EEOC staff member was behind the glass at the time?
A. I believe so, yes. When we walked in, we checked in with him, and I believe, yes, he was still there.
Q. Mr. Katt, during your time at work at Coca-Cola Bottling Company of Albuquerque, were you a member of the Human Resources Department?
A. No.
Q. Were you ever a member of the Human Resources Department?

[p.95]

A. No.
Q. Did you, during your employment with Coca-Cola, ever participate in the establishment or implementation of the attendance policy?
A. No.

Q. During your employment at Coca-Cola, did you ever participate in the establishment or implementation of the no call, no show policy?
A. No.
Q. During your employment at Coca-Cola Bottling Company of Albuquerque, did you participate in the establishment or implementation of the insubordination policy?
A. No.
Q. In your declaration, Mr. Katt, you stated you did not have disciplinary authority over any merchandiser, including Mr. Peters, Ms. Lovato, Mr. Lopez or Mr. Mirabel; is that true?
MS. MOLINA: Objection. The document is entitled statement, not declaration.
MR. PRESNELL: Yes, Exhibit MM. We all know what we're talking about.
Q. (By. Mr. Presnell) Is that a true statement, Mr. Katt?
A. Yes, that's true. I did not have

[p.96]

direct --
Q. All right. Did you at any time at Coca-Cola Bottling Company of Albuquerque have any disciplinary decision-making authority over any other employee?
A. No.
Q. With respect to Mr. Peters' did you participate in the decision by Coca-Cola Bottling Company of Albuquerque to terminate his employment?
A. No.
Q. Did Pat Edgar or Sherry Pederson or Cesar Grado call you in to the termination meeting on October 2nd, I believe, 2001?
A. No.

Q. Your testimony earlier about, I believe it was, Mr. Martinez, Mr. Lopez, Mr. Mirabel and Ms. Lovato being insubordinate, do you recall that testimony?
A. Yes.
Q. Okay. Is that based upon your personal understanding of what insubordination is or is not?
A. I don't understand the question.
Q. You testified that it was your opinion that Mr. Martinez, Mr. Lopez, Mr. Mirabal and Ms. Lovato were insubordinate; is that right?

[p.97]

A. Correct.
Q. All right. And that's your opinion based upon your understanding of the definition insubordination?
A. Correct.

MR. PRESNELL: Those are all the questions I have. Thank you.

MS. MOLINA: All right. I don't have anything further.

THE WITNESS: Thank you.

(The deposition concluded at 4:02 p.m.)

EXHIBIT

EXCERPTS OF DEPOSITION OF STEPHEN BRIAN PETERS

[p.85]
needs are for those stores he has?

MS. MOLINA: Object to form, speculation. Go ahead.

Q. (By Mr. Presnell) Is that right?

A. The account manager has a route, just like I have a route. He has certain stores that he has to fill up with sodas, as far as he knows what to order.

Q. Right.

A. He has a route.

Q. Okay.

A. Just like I have a route.

Q. And an account manager is only responsible for his route, or is he responsible for other account manager's routes?

A. As far as to my knowledge, he's only responsible for his route.

Q. Okay. So that account manager would only have knowledge of the merchandising needs of his accounts?

A. Of his accounts.

Q. Okay. When you were employed at Coca-Cola Bottling Company between 1999 and 2001, did you ever make any internal complaints at the company?

A. I can't recall. I think I made a complaint as far as after -- I can't recall.

Q. Okay. Something's in your mind. You can't

[p.86]

recall whether you made a complaint or not?

A. Yeah. I mean, if you would rephrase that, as far as a

complaint against --

Q. Well, I mean a complaint -- let me try to break it up for you. Maybe that will help you. Did you ever make a formal complaint between 1999 and 2001 about any work-related problem?

MS. MOLINA: Objection, ambiguous, vague. Go ahead.

A. Not that I recall.

Q. (By Mr. Presnell) Okay. Do you recall ever completing a Complaint type form or any other type of written form about any work-related problem?

MS. MOLINA: Same objection. Go ahead.

A. Oh, I think to Bill Donnelly, about the conversation we got into. Maybe that's -- if I recall, I might have filled something out about that.

Q. (By Hr. Presnell) Okay. Do you remember any other written complaints you may have made during that time?

A. I can't recall.

Q. Okay. What was the nature of your complaint against Mr. Donnelly?

A. The nature of it was that he came in the store hollering at me.

[p.87]

Q. And your complaint was what, in general terms?

A. I can't recall everything that I wrote in the complaint, but it was probably based on disrespect, disrespecting me.

Q. Did you ever complain, whether formally or informally, that Mr. Donnelly discriminated against you because of your race?

A. I can't recall.

Q. Did you ever make any complaints, formal or informal, that somebody at somebody at Coca-cola discriminated against you because of your race?

A. By "any complaints," do you mean -- are you asking me did I make any complaints at Coca-Cola?
Q. Correct.
A. I never made any complaints at Coca-Cola, filled out any complaints at Coca-Cola.
Q. Okay. Did anyone ever make any complaints against you while you were at Coca-Cola?
A. Any complaints against me as far as, what kind of complaints?
Q. Work-related conduct, you acted inappropriately or you did this or did that.
A. Mr. Donnelly.
Q. Any others, that you recall?
A. Not that I recall.

[p.88]

Q. Was Mr. Donnelly's complaint against you, did it arise out of the same incident that your complaint against him arose out of?
A. Yes, sir.
Q. Okay. There weren't two separate incidents that we're talking about?
A. No, sir.
Q. Okay. What year was the incident with Mr. Donnelly that resulted in these complaints?
A. If I'm not mistaken, I think it was 1999.
Q. Did Coca-Cola take any disciplinary action against you arising out of those complaints?
A. Yes, sir.
Q. What was the discipline?
A. I think I was suspended for two days, if I'm not mistaken.
Q. Were you given any warnings?
A. Any warnings?
Q. As part of that discipline.

A. An a warning, you mean afterwards, or -- no, sir.
Q. That's a good clarification. Let me restate the question. In addition to the two-day suspension, were you warned that further incidents could result in termination
A. Not that I recall, as far as --

[p.89]

Q. Okay. You don't recall one way or the other?
A. No, I don't recall.
Q. Did you review the discipline report arising out of that incident in 1999?
A. I think I may have.
Q. Who spoke with you about the discipline, the two-day suspension at that time, in 1999?

MS. MOLINA: Objection as to form, assuming facts not in evidence.

A. A lady in Human Resources, Eddie Esquivel and Bill Donnelly.
Q. (By Hr. Presnell) Okay.
A. I can't recall if it was Sherry Peterson or not at that time. I don't think it was her at that time -- it wasn't her at that time, I don't think so. It was another lady.
Q. Was this one meeting with all three of those persons there, or three separate meetings?

MS. MOLINA: Objection to the form of the question, assuming facts not in evidence. Go ahead.

A. One meeting.
Q. (By Mr. Presnell) And the HR person, who was a female, was there?
A. Yes.
Q. And Mr. Esquivel and Mr. Donnelly, correct?

[p.90]

A. Yes.
Q. And you?
A. Yes, sir.
Q. All right. Let me hand you this document. Take a second to look at that, Mr. Peters. It was produced to us by the EEOC in this lawsuit. Is that the disciplinary status notice arising from the incident that you and I were just talking about?
A. Yes.
Q. Okay. And this document shows the two-day suspension that you referenced?
A. Yes.
Q. Okay. It's noted on this document on the employee signature line, "Refused to sign"; do you see that?
A. Yes.
Q. Is that correct, that you refused to sign this?
A. Yes, sir.
Q. Did you review this document and refuse to sign it?
A. Yes, sir.

MR. PRESNELL: All right. I'd like to make that Exhibit 1, please.

Mr. Peters, I need to take a short break because I need to make a copy, because this Exhibit 1 is actually

[p.91]

a two-page document and I only showed you one page, okay
A. Okay.

(A discussion was held off the record.)

Q. (By Mr. Presnell) Okay, Mr. Peters. We'll do this again. Exhibit 1 is really a two-page document identified on the bottom as Documents 111 and 112, right
A. Uh-huh.

Q. And as you'll notice in the description on the first page, it says "Over," and that's the second page, and I forgot to have that copied. So I apologize for that. But if you will take a look at that and just verify that's from the same document.

MS. MOLINA: Counsel, what are you asking him to verify? If it's the same document? Same document as what? I want that clear on the record.

MR. PRESNELL: Yes. The disciplinary status notice is a two-page document, and I forgot to have the second page copies.

MS. MOLINA: Okay.

MR. PRESNELL: All right. So let's make both these pages Exhibit 1.

(Exhibit 1 was marked for identification.)

Q. (By Mr. Presnell) And I believe I asked you this, but this is the document you refused to sign?

A. Yes, If I recall, that's it.

[p.92]

Q. Okay. All right.

MS. MOLINA: For the record, Counsel was pointing specifically to page 111.

A. I don't remember this, that second part. I don't remember that.

Q. (By Mr. Presnell) All right. This is a document that the EEOC produced to us and labeled 111 and 112. It's a two page document.

A. Uh-huh.

Q. So let me start over. I've made it Exhibit 1 already. Have you ever seen this document? And I mean the two pages, both pages, front and back.

A. I remember seeing this first page, but I just don't remember the second page.

Q. You don't deny that you read it, you just don't recall?

A. I don't remember. I don't recall seeing it.
Q. I want to make sure we're clear. You're not claiming that this is something that's made up, are you, this second page?
A. I'm not claiming that. I'm just saying I don't recall seeing that.
Q. You don't remember seeing that one way or the other?
A. Yes, sir.

[p.93]

Q. All right. And you understand, even though this is a copy that's two pages, it's really a front and back of the disciplinary status notice of September 17, 1999?

MS. MOLINA: Objection to the form of the question. That's assuming facts not in evidence. It's not presented as a one-page form.

MR. PRESNELL: Well, you produced it, Ms. Molina. Is it one document or two documents?

MS. MOLINA: Well, Counsel, we produced it only after we got it from your client, BCI Coca-Cola. That's where we got the document, and we got it in the state it is now. No, we don't have the original where we can verify whether it's one page or two pages.

MR. PRESNELL: Okay. Well, is the EEOC claiming this is two separate documents and they don't go together?

MS. MOLINA: We're not claiming that, Counsel. We are claiming this is the way the document was presented to the EEOC in the investigation of this case.

MR. PRESNELL: Well, that's what I said. This is the disciplinary status notice. And I'm asking Mr. Peters if this was what was shown to him and that he refused to sign.

MS. MOLINA: Objection to the form of the question, assuming facts not in evidence. Are you asking the witness to say that this document itself is a document

[p.94]

that --

MR. PRESNELL: Stop, stop, stop. That's not an appropriate objection. You can object to the form of the question and --

MS. MOLINA: Object to the form of the question.

MR. PRESNELL: Excuse me, I'm not finished. You can object to the form of the question and that's it.

MS. MOLINA: Object to the form of the question.

MR. PRESNELL: And I'm not going to tolerate any more speaking objections today.

Q. (By Mr. Presnell) So, let me start over, Mr. Peters. Have you reviewed this document, Exhibit 1?
A. I recall this one, but I don't recall this one. I may recall this one, but not this one.
Q. All right. And for the record, you recall seeing the document that's identified as number 111 at the bottom, correct?
A. Yes, sir.
Q. And it's titled Disciplinary Status Notice at the top?
A. Yes, sir.
Q. All right. And you do not recall seeing the document that's identified as 112?
A. I don't recall seeing that one.
Q. All right. You're not denying that document 112

[p.95]

is the back of document 111, you just don't recall?
A. I don't recall.

MS. MOLINA: Object to the form of the question.

Q. (By Mr. Presnell): You don't recall?
A. I don't recall.

Q. All right. Thank you.

Mr. Peters, did you participate to any degree in the EEOC's responding to Defendants' Interrogatories in this case?

A. What do you mean by that?

Q. Okay. Let me show you. The EEOC responded to written questions that we sent to them. And I'm not saying you should have, I'm just asking you whether you did.

Let me show this to you. Have you ever seen that document?

A. Yes.

Q. Okay. You have seen it before?

A. Yes.

Q. When did you see it?

A. I can't recall when I've seen it.

Q. Did you help answer these questions?

A. As far as on the back, you mean? Or what questions?

MS. MOLINA: Object to the form of the question.

[p.96]

Could you be more specific as to which question you're talking about?

Q. (By Mr. Presnell) I'm talking about any of them. Did you help answer any of them?

A. Yes.

Q. All of them? Some of them?

MS. MOLINA: Object to the form of the question. Go ahead.

A. I can't recall all of them or -- I mean, some of them, I guess.

Q. (By Mr. Presnell) But you helped to some degree in answering some of these questions?

MS. MOLINA: Object to the form of the question. Go ahead.

A. Yes.
Q. (By Mr. Presnell) Okay. Look at Interrogatory Number 6 for me. Did you read that?
A. Yes, sir.
Q. Essentially, I asked for the identification of employers with which you tried to gain employment after October 2001, right?
A. Yes, sir.
Q. Did you assist the EEOC in providing the answer to number 6?
A. You mean did I give them the paperwork of the --

FILED
FEB 20 2007
SUPREME COURT

(7)

No. 06-341

In the Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S BRIEF ON THE MERITS

THOMAS C. GOLDSTEIN
AKIN GUMP STRAUSS HAUER & FELD LLP
ROBERT S. STRAUSS BUILDING
1333 HAMPSHIRE AVENUE, NW
WASHINGTON, D.C. 20036
(202) 887-4060

Co-Counsel for Petitioner

ERIC TODD PRESNELL
Counsel of Record
KARA E. SHEA
T. HAROLD PINKLEY
DAVID L. JOHNSON
MILLER & MARTIN PLLC
1200 ONE NASHVILLE PLACE
150 FOURTH AVENUE NORTH
NASHVILLE, TENNESSEE 37219
(615) 244-9270

Counsel for Petitioner

February 20, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED FOR REVIEW

Under what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, where the person(s) who actually made the adverse employment decision undisputedly harbored no discriminatory motive toward the affected employee.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding are set forth in the case caption. The corporate disclosure statement contained in the Petition for Writ of Certiorari, Pet. App. iii, remains accurate. *See* SUP. CT. R. 24.1(b), 29.6.

TABLE OF CONTENTS

Question Presented for Review i

Parties to the Proceeding and Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities vi

Opinions Below 1

Jurisdictional Statement 1

Statutory Provisions Involved 1

Statement of the Case 2

I. UNDISPUTED MATERIAL FACTS 3

II. DECISIONS BELOW 12

Summary of the Argument 14

Argument 19

I. BECAUSE TITLE VII APPLIES TO THE CONDUCT OF EMPLOYEES WITH ACTUAL DECISIONMAKING AUTHORITY, BCI MAY NOT BE LIABLE MERELY BECAUSE GRADO MAY HAVE INFLUENCED PETERS'S TERMINATION 21

A. An Employer May Be Liable where an Agent, with Either Formal Authority or Practical Power to Make a Decision, Takes an Adverse Employment Action Against an Employee on the Basis of a Protected Trait 21

B. The EEOC Cannot Demonstrate That Grado Was the Actual Decisionmaker Responsible for Peters's Termination 24

II. BCI ALSO FULLY COMPLIED WITH TITLE VII BECAUSE EEOC DOES NOT ALLEGE THAT BCI WAS NEGLIGENT AND DID NOT SHOW THAT GRADO'S CONDUCT CAUSED PETERS'S TERMINATION 28

A. The EEOC Cannot Make Out a Claim That BCI Made Insufficient Efforts to Identify and Investigate Claims of Bias by Employees Such as Grado 33

B. Grado's Conduct Did Not Cause Peters's Termination 34

III. THE TENTH CIRCUIT'S MORE EXPANSIVE THEORY OF LIABILITY LACKS MERIT . . . 40

A. The Tenth Circuit's Decision Misapplies Supreme Court Precedent to Expand an Employer's Vicarious Liability Beyond the Bounds Necessary to Serve the Purposes of Title VII 40

B. The Tenth Circuit's Standard of Liability Overburdens Employers 43

C. The Tenth Circuit's Standard is Not Necessary to Prevent Employers from Remaining Willfully Blind to the Discriminatory Actions of Their Subordinates 47

D. BCI Prevails Even Under the Tenth Circuit's Expansive Standard Because the Record Does not Suggest that Edgar's Decisionmaking was Tainted by Discrimination 48

Conclusion 49

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 30

Bender v. Hecht's Dep't Stores,
455 F.3d 612 (C.A.6 2006) 46

Bullington v. United Air Lines, Inc.,
186 F.3d 1301 (C.A.10 1999) 26

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) . . . . . *passim*

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) . . . . . *passim*

Ford Motor Co. v. EEOC,
458 U.S. 219 (1982) 32

Hill v. Lockheed Martin Logistics Mgmt., Inc.,
354 F.3d 277 (C.A.4 2004) . . . . . *passim*

Holcomb v. Powell,
433 F.3d 889 (C.A.D.C. 2006) 46

Kariotis v. Navistar Int'l Transp. Corp.,
131 F.3d 672 (C.A.7 1997) 26

Kolstad v. Am. Dental Ass'n,
527 U.S. 526 (1999) . . . . . *passim*

Llampallas v. Mini-Circuits, Lab, Inc.,
163 F.3d 1236 (C.A.11 1998) 20, 23, 29

Long v. Eastfield Coll.,
88 F.3d 300 (C.A.5 1996) 23

Mahar v. StoneWood Transp.,
2003 ME 63, 823 A.2d 540 (Me. 2003) 41

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 30

Meritor Sav. Bank, FSB v. Vinson,
477 U.S. 57 (1986) . . . . . *passim*

Millbrook v. IBP, Inc.,
280 F.3d 1169 (C.A.7 2002), *cert. denied*,
537 U.S. 884 (2002) 46

Nat'l R.R. Passenger Corp. v. Morgan,
536 U.S. 101 (2002) 26

Penn. State Police v. Suders,
542 U.S. 129 (2004) 31

Pippin v. Burlington Res. Oil & Gas Co.,
440 F.3d 1186 (C.A.10 2006) 46

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133 (2000) . . . . . *passim*

Russell v. McKinney Hosp. Venture,
235 F.3d 219 (C.A.5 2000) 24

Santiago-Ramos v. Centennial P.R. Wireless Corp.,
217 F.3d 46 (C.A.1 2000) 24, 25

Shager v. Upjohn Co.,
913 F.2d 398 (C.A.7 1990) . . . . . *passim*

Stallings v. Hussmann Corp.,
447 F.3d 1041 (C.A.8 2006) 46

Willis v. Marion County Auditor's Office,
118 F.3d 542 (C.A.7 1997) 29

Acts:

Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716,
78 Stat. 241, 253-66 (1964) (Title VII) 1

Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78
Stat. 253-54 (1964) 1, 2

Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1),
78 Stat. 241, 255 (1964) 21

Statutes:

15 U.S.C. § 260a 10

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e(b) . . . . . *passim*

42 U.S.C. § 2000e-2(a) 1, 2, 19

ARIZ. REV. STAT. ANN. § 1-242 10

Restatements:

RESTATEMENT (SECOND) OF AGENCY
§ 219(2)(d) (1957) 40, 41

RESTATEMENT (THIRD) OF AGENCY
§ 2.04 (2006) 19, 21

RESTATEMENT (THIRD) OF AGENCY
§ 7.03 (2006) . . . . . *passim*

RESTATEMENT (THIRD) OF AGENCY
§ 7.05 (2006) 20, 28, 42

RESTATEMENT (THIRD) OF AGENCY
§ 7.08 (2006) 42

Rules:

SUP. CT. R. 24.1(b) iii

SUP. CT. R. 29.6 iii

Miscellaneous:

Brief for the United States and the EEOC as Amici Curiae, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979) 22, 23

Daniel M. Combs, Casenote, Costos v. Coconut Island Corp.: *Creating a Vicarious Liability Catchall Under the Aided-By-Agency-Relation Theory*, 73 U. COLO. L. REV. 1099 (2002) 40

Paula J. Dalley, *All in a Day's Work: Employers' Vicarious Liability for Sexual Harassment*
104 W. VA. L. REV. 517 (2002) 41

C. MCCORMICK, LAW OF DAMAGES (1935) 31, 32

WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY (1964) 40, 41

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, Pet. App. 1a-31a, is published at 450 F.3d 476. The unpublished memorandum opinion and order of the United States District Court for the District of New Mexico, Pet. App. 32a-76a, is unofficially reported at 2004 WL 3426757.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 7, 2006. Pet. App. 1a. This Court has jurisdiction to review this judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, as codified ("Title VII"), provides, in relevant part, as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1).

Section 701(b) of Title VII, as codified and amended, provides, in relevant part, as follows:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more

> employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

42 U.S.C. § 2000e(b).

STATEMENT OF THE CASE

The petitioner, BCI Coca-Cola Bottling Company of Los Angeles ("BCI"), terminated an African-American employee, Stephen Peters ("Peters"), for insubordination. Peters, who was employed at BCI's facility in Albuquerque, New Mexico, refused a direct order from his Hispanic supervisor, Cesar Grado ("Grado"), to come to work. The Equal Employment Opportunity Commission ("EEOC") claims that BCI's reason for terminating Peters is pretextual and that Peters was actually terminated because of his race. It is undisputed that the individual who made the decision to terminate Peters, BCI Employee Relations Manager Patricia Edgar ("Edgar"), harbored no discriminatory bias toward Peters; indeed, Edgar did not even know Peters was African-American when she made the termination decision. Pet. App. 9a. The EEOC nonetheless sued BCI, alleging that Grado was biased toward African Americans and that his bias somehow influenced Edgar's decision to terminate Peters. Prior to this litigation, BCI had never received any complaints about Grado's alleged racial bias. JA 49.

Title VII of the Civil Rights Act of 1964, as codified and amended, makes it unlawful for an "employer," including its "agent," 42 U.S.C. § 2000e(b), to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(1). Although Title VII includes

provisions authorizing courts to award damages (including punitive damages in certain cases), the purpose of this statute is not to remedy discrimination after the fact through litigation. Rather, Congress's overriding goal was to stop discriminatory practices in advance by encouraging employers "to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999). It now falls to this Court, keeping these essential principles underlying Title VII in mind, to decide under what circumstances an employer may be liable based on a subordinate's discriminatory bias, where the person who actually made the adverse employment decision undisputedly harbored no discriminatory animus toward the affected employee. Applying its standard, the Court must also determine whether the EEOC has made the required showing in this case to survive BCI's motion for summary judgment.

I. UNDISPUTED MATERIAL FACTS.

1. BCI, a bottler of Coca-Cola® products, has adopted a comprehensive system of policies and procedures to detect and deter workplace discrimination. JA 24–27. BCI provides these policies and procedures to every employee. *Id.* BCI requires that all management employees be trained under those policies and instructed with respect to equal employment opportunity issues, such as affirmative action, workplace diversity, and the anti-discrimination provisions of Title VII. JA 24–25. Grado received such training, conducted by Edgar. JA 24–25, 35.

BCI's written Equal Employment Opportunity Policy prohibits discrimination based on race and provides that "[e]very employee has a responsibility to contribute to a positive work atmosphere, which reflects our non-discrimination policies." JA 26–27. BCI expressly requires every employee to "report incidents of harassment or

discrimination" to the company, which has a professional Human Resources Department responsible for addressing such issues. *Id.* Employees are provided the direct number to reach the Vice President of Human Resources. *Id.*

BCI also maintains a centralized investigative and decisionmaking system for addressing complaints about employee misconduct, which is designed to ensure consistent enforcement of BCI's personnel policies and to guard against discrimination. Under this system, BCI's supervisors monitor the employees working under their supervision, and when an employee has an attendance, performance, or disciplinary problem, the issue is brought to the attention of the Human Resources Department. JA 18, 31, 45, 86–88. A Human Resources representative, not a supervisor, determines whether a workplace policy applies to the situation and orders appropriate action. JA 18, 45, 83–84, 86–88.

To ensure that the company acts consistently and lawfully in addressing allegations of employee misconduct, BCI's Human Resources personnel consult written policies setting forth workplace rules and regulations, which are divided into three categories according to the severity of the infraction. JA 45, 50–61. Insubordination, classified by BCI in the most serious category of violations, does not encompass a situation in which an employee merely has failed to show up for work, failed to meet performance expectations, or failed to follow a supervisor's instructions. JA 20, 45, 50–51. Under BCI policy, insubordination occurs when an employee is told, or demonstrates that he knows, that he is considered to be defying a direct order from his supervisor and that his conduct could lead to termination. JA 20, 86–88. A single instance of insubordination is sufficient to result in immediate discharge. JA 45. Only a specially authorized Human Resources representative, however, can order a sanction as serious as termination. JA 18, 45, 84.

It is undisputed that under BCI's centralized decisionmaking system, Grado, as a district sales manager, had no authority to discipline or terminate employees working under his supervision. JA 31, 86–88, 91. The top-ranking BCI Human Resources representative at the Albuquerque facility during the relevant period was Senior Human Resources Administrator Sherry Pedersen. JA 45. BCI supervisors such as Grado brought issues regarding employee discipline to the attention of Pedersen, who had authority to make decisions regarding all disciplinary actions short of termination. JA 31, 33, 45. All termination decisions, however, required approval by an even higher level of authority: namely, Pedersen's supervisor, Edgar, who was located in Phoenix. JA 18, 45, 84.

2. Peters worked as a "merchandiser" with responsibility to deliver Coca-Cola® products to accounts such as grocery stores, to place and rotate the product, to clean and arrange display areas, and to place promotional materials. JA 29–30. Peters was one of six merchandisers working under Grado's supervision. *Id.* Grado was responsible for scheduling merchandisers for all accounts in his territory. JA 30, 98. Merchandisers worked five days each week with two days off; because accounts had to be serviced seven days per week, none of the merchandisers shared the same off-day schedule. JA 30. All merchandisers regularly were required to work on their scheduled days off in order to provide extra coverage for routes during particularly busy times or when other employees were absent. *Id.*

Because of his seniority, Peters was the only merchandiser who had Saturday and Sunday (the most preferred off-days) as his regularly scheduled days off. JA 30–31. Although Peters was occasionally called upon to work on his scheduled days off, he typically was required to do so less often than his

fellow merchandisers.[1] Unlike some of his Hispanic coworkers, Peters was never written up by Grado for performance issues, and in fact Peters received a service award while working under Grado's supervision. JA 35, 105.

3. Grado needed extra coverage for the weekend of Saturday, September 29 and Sunday September 30, 2001, because three of the chain stores in his area were running a special promotion requiring delivery of additional product. JA 31–32. Grado therefore asked one of his account managers, Jeff Katt, to tell Peters that he needed him to work on one of his days off that weekend. JA 32, 100. Katt spoke with Peters, who told Katt he could not work that weekend because he "had plans." JA 101. On Friday, September 28, 2001, Katt told Grado that he believed Peters would be unwilling to work on his days off during the upcoming weekend. JA 31, 32, 100–01. It is Grado's recollection that Katt also told him he believed that if Peters were asked to work, he would call in sick. JA 32. Although this last aspect of the communications between Katt and Grado is disputed—Peters denies ever telling Katt that he would call in sick—this dispute is immaterial. JA 107.

On Friday, September 28, one of the other merchandisers who typically covered Peters's routes on Peters's scheduled days off suffered a shoulder injury and was taken off work. JA 32. Because the remaining merchandisers were already scheduled to work that weekend, Grado was now a person short and had no one left to bring in except Peters. JA 31–32, 38–41. Given Katt's statements that Peters was likely to resist coming in on his day off, and because Grado was unsure whether he had the authority to require an employee

---

[1] For instance, during the first nine months of 2001, Peters worked on his scheduled days off fewer times than three of the Hispanic merchandisers and one of the white merchandisers reporting to Grado. JA 30, 31, 38–41.

to work on a scheduled day off, Grado sought advice from BCI's Human Resources Department. JA 33.

Ordinarily, Grado would have spoken with Pedersen regarding the situation, but as she was out of the office, he called Edgar, in Phoenix. JA 18–19, 33, 46, 94. Edgar asked Grado if he had another way of covering the responsibilities; when he confirmed that he did not, Edgar told him that he could require Peters to work. JA 19, 33. Edgar inquired whether Peters had a compelling reason not to work. Grado reported that he had heard that Peters would call in sick if directed to work. JA 19, 32. Edgar stated that such a response would violate BCI policy and that Grado should call Peters himself. JA 19, 57–58. She further directed Grado that unless Peters presented a compelling reason why he could not work on the day in question, Grado should give Peters a specific order to work and should advise Peters that failure to comply with the order would be insubordination that could lead to termination. JA 19, 20, 33.

Grado followed Edgar's directives. When contacted by Grado and told to come to work on Sunday, September 30, Peters responded that he "had plans, and wasn't feeling well all that week." JA 33, 70, 71, 93. As Peters acknowledged, Grado clearly gave him an order, stating "I'm not asking you to come to work, I'm telling you to come to work. If you do not come to work, it could lead to insubordination and could lead to termination." *Id.* Peters also acknowledged that he responded by confirming he would not work, telling Grado, "[D]o what [you've] got to do, and I'll do what [I've] got to do." *Id.* Grado again contacted Edgar, recounting the

conversation.[2] JA 20, 33, 34; 93-95. Significantly, however, Grado did not recommend or request that any disciplinary action be taken. JA 23, 33-34.

Based on his conversation with Peters on Friday, Grado understood that Peters would not be coming in on Sunday. Accordingly, Grado spoke with Katt again on Friday afternoon to make arrangements to cover all the routes on Sunday. JA 34, 97. Because no merchandisers were available, Grado and Katt planned to cover the routes themselves, and they in fact did so. JA 34, 252.

Peters did not report for work on Sunday, September 30, and he did not attempt to contact Grado during the weekend or at any point thereafter to explain his absence. Record at 74 (Appendix A to EEOC Response to Motion for Summary Judgment) (Plaintiff's Statement of Facts "PSOF"), Fact No. 7. Peters did visit a walk-in medical clinic on Saturday, September 29, and was diagnosed with a sinus infection (as evidenced by a note from the doctor he secured after being terminated). JA 292, 293; Record at 74 (PSOF Fact No. 7). Peters called in sick to Katt on Saturday night. Record at 74 (PSOF Fact No. 8). Katt, in turn, unsuccessfully attempted to contact Grado; accordingly, Grado and Edgar were unaware of these facts at the time. JA 21-22, 34, 250, 254. Regardless, based on his conversation with Peters on Friday, Grado already understood that Peters was not coming to work Sunday. JA 34, 70, 71, 93.

4. Pursuant to BCI policy, the Human Resources Department evaluated Peters's conduct to determine what action should be taken. Pedersen, in Albuquerque, reviewed

---

[2] Contrary to the Tenth Circuit's suggestion, Pet. App. 29a, there is no evidence that Grado embellished his account of his conversation with Peters to Edgar by claiming that Peters yelled or reacted angrily.

Peters's personnel file. JA 21, 46. The file revealed that two years earlier Peters had been disciplined for insubordination to a supervisor other than Grado. JA 21, 46. In that incident, Peters had refused to work on a scheduled day off and had become confrontational with the supervisor.[3] JA 46, 60–61. The infraction was serious enough to trigger Peters's suspension and a warning that further insubordination could lead to termination. *Id.* Pedersen relayed this information to Edgar in Phoenix for her to consider in judging how to respond to Peters's actions. JA 21, 46, 82.

During telephone conversations with Pedersen and Grado on Monday, October 1, Edgar reviewed again the events pertaining to Peters's misconduct. JA 21. She confirmed that Peters had not reported to work and had not attempted to contact Grado. JA 21–22, 34. At Edgar's request, Grado checked whether Peters had contacted Katt; learning that he had, Grado immediately reported that fact to Edgar. JA 21–22, 23, 34. Once again, Grado did not request or recommend any disciplinary action, nor did Edgar solicit his views on that question.[4] *Id.*

---

[3] The Tenth Circuit's fact statement includes Peters's self-serving, inflammatory version of this incident (he claims he needed to be absent to be a pallbearer at a friend's funeral). Pet. App. 6a–7a. Peters's explanation of these events, however, is immaterial, as there is no evidence that this prior disciplinary incident was motivated by race discrimination or that Grado or Edgar had any knowledge of the circumstances surrounding the incident, other than what was depicted in Peters's personnel file.

[4] The Tenth Circuit states that "Grado never *officially* recommended that Peters be terminated," suggesting that Grado offered some type of "unofficial" recommendation. Pet. App. 12a (emphasis added). There are no facts to warrant such an inference.

Neither Grado nor Edgar testified as to the specific time on Monday when they received the information that Peters had called in sick to Katt; however, Edgar did testify that she received this information while she was still considering how to address Peters's situation and before she made the final decision to terminate him. JA 21–22, 34. Katt was more specific, testifying that he relayed this information to Grado "around 6 p.m. or something" on Monday.[5] JA 254–55.

The Tenth Circuit concluded that this testimony by Katt created a factual dispute as to whether Edgar found out about Peters calling in sick to Katt before she made the decision to terminate Peters. Pet. App. 28a. BCI does not concede this point. Edgar testified that she made her decision "by the end of the day" Monday. JA 22. Thus, although Katt's testimony supports the conclusion that Edgar learned about Peters calling in sick no earlier than "around 6 p.m." (which would have been "around 5 p.m." for Edgar)[6] on Monday, this conclusion is not inconsistent with Edgar's testimony that she learned this fact prior to making her decision to terminate Peters "by the end of the day" Monday. *Id.*

---

[5] The Tenth Circuit inaccurately states that "[a]ccording to Katt, this exchange took place Monday evening, after Edgar already made her decision to terminate Peters." Pet. App. 8a. It is undisputed that Katt had no knowledge of Edgar's deliberations or the timing of her decision to terminate Peters. JA 320. His testimony on this point speaks solely to his best recollection of when he imparted this information to Grado.

[6] Because Arizona, unlike New Mexico, does not observe Daylight Savings Time, Edgar was an hour behind Grado and Katt on the date in question. *See* 15 U.S.C. § 260a (federal Daylight Savings Time statute); ARIZ. REV. STAT. ANN. § 1-242 (Arizona statute opting out of federal Daylight Savings Time requirements). In 2001, Daylight Savings time was in effect from April 1, 2001 through October 28, 2001. *Cf.* 15 U.S.C. § 260a.

In any event, it is undisputed that on Monday, October 1, Edgar—and Edgar alone—made the decision to terminate Peters's employment for insubordination. *Id.* Edgar ultimately concluded that Peters had engaged in insubordination (his second infraction), which properly subjected him to discharge. JA 22, 80–81. In her judgment, the principal act of insubordination was Peters's response on Friday to Grado's direct order to work during the weekend. JA 20, 22–23, 82. Edgar considered the fact that Peters had subsequently called in sick to Katt, but she concluded that this fact was insufficient to excuse his behavior. In Edgar's view, Peters's failure to report to work on Sunday was not merely an attendance issue but was an extension of his earlier defiant conduct. JA 22–23. Edgar determined that Peters's claimed sickness was also suspect; he had worked on both Friday and Monday, suggesting that, whatever his claimed ailment, he was capable of working during the weekend as well. Edgar also found it suspicious that Peters chose to call in sick to Katt rather than to Grado. *Id.* The EEOC argued to the district court—and BCI does not dispute—that with regard to scheduling issues, including calling in sick, merchandisers customarily dealt with BCI's account managers such as Katt rather than with district sales managers such as Grado. Record at 74 (PSOF Fact Nos. 41, 42). However, Edgar determined that, given the inflammatory content of the exchange between Peters and Grado on Friday, had Peters been truly too sick to work and had he been genuinely interested in preserving his employment relationship with BCI, he would have called Grado directly. JA 23.

In reaching the decision to terminate Peters, Edgar further considered his prior incident of insubordination. His previous conduct mirrored the current situation and, significantly, it had involved a supervisor other than Grado, thus reinforcing the credibility of Grado's description of the more recent

event. JA 21–22, 82. In addition, failing to terminate Peters after a second act of direct insubordination would set a bad precedent. JA 22.

5. On Tuesday, October 2, 2001, at Edgar's instruction, Pedersen and Grado met with Peters and advised him that he was being terminated for insubordination. JA 24, 46–47. They provided him with a written disciplinary notice that specifically referenced his insubordinate comments to Grado. JA 35, 42–43. Before this meeting, neither Pedersen nor Edgar was aware that Peters was African American. JA 24, 47. At no point during the termination meeting or its immediate aftermath did Peters suggest that Grado was biased or that BCI's decision was based on racial animus. JA 49, 67–69. Indeed, prior to this litigation, neither Peters nor any other employee had lodged any complaint with BCI regarding Grado's supposed racial bias. JA 49, 68–69. Peters nonetheless elected to file a charge of discrimination with the EEOC, which subsequently filed this suit.

II. DECISIONS BELOW.

1. The district court granted summary judgment to BCI. Pet. App. 32a–33a, 76a. The court found it indisputable that Peters's admitted conduct was insubordination warranting termination and that Edgar's employment action was not influenced by race (in part because she did not know his race). *Id.* at 58a, 69a–71a. The district court found that, although the EEOC created a dispute of fact over whether Grado was racially biased in a general sense based on claims made about him (for the first time in this litigation) by former BCI employees, the EEOC provided no evidence to establish that Grado's role in the specific termination process at issue was sufficient to render BCI liable for his conduct. *Id.* at 66a–67a, 71a. The court found compelling the fact that BCI had established and followed a neutral, centralized decisionmaking process, pursuant to which Edgar

independently researched and evaluated Peters's conduct and employment history. *Id.* at 64a–67a, 71a. Nor was there substantial evidence that Grado had utilized even his limited discretion to report employee misconduct in a discriminatory manner; rather, he relayed factually accurate information to Edgar. *Id.* at 63a, 75a. The district court found that "[t]he EEOC has not presented evidence that Grado would not have called Edgar if Peters [were] Anglo or Hispanic." *Id.* at 67a. Although the district court noted that Grado did not make an express recommendation that Peters be terminated, it did not base its ruling solely on this fact; rather, the court concluded more generally that the EEOC presented no evidence of a "causal connection between [Grado's] racial bias and his decision to involve Edgar." *Id.* at 68a.

2. Following the EEOC's appeal, the Tenth Circuit reversed. The Tenth Circuit viewed the issue ultimately as one of causation, stating that "the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action." *Id.* at 20a–21a. In this respect, the court concluded, it makes no difference whether the allegedly biased supervisor made any recommendation or request for the challenged employment decision. *Id.* at 21a–22a. The Tenth Circuit held that, to defeat causation, the employer must show that it independently investigated the facts underlying the employment action. *Id.* at 21a.

Applying this standard, the Tenth Circuit concluded that the EEOC was entitled to a jury trial on its claim. Because Edgar "conducted no independent inquiry into the events that took place" when Grado directed Peters to work, "[i]f the jury concludes that Mr. Grado's report was tainted by race discrimination . . . it could also find that the proffered reason for firing Mr. Peters, which rests entirely on that report, is pretextual." *Id.* at 28a–29a. "The question is not whether

Ms. Edgar *could have* terminated Mr. Peters because of his closing remark alone [to "do what you have to do"], which appears to have been permissible under BCI policy, but what *actually did* cause the adverse employment action." *Id.* at 30a. "Simply pulling the file [of Peters's work history] does not constitute an independent investigation, and a jury could conclude that Mr. Grado's factually disputed report—the sole source of information on which Ms. Edgar relied—caused the termination." *Id.* at 31a.

This Court subsequently granted certiorari.

SUMMARY OF THE ARGUMENT

I. A. Title VII governs the conduct of employers and their agents. Interpretation of the statute is guided in the first instance by principles of agency law, which look to the employee who has "principal responsibility" for the relevant employment decision. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). This responsibility may be practical as well as formal, as when a nominal decisionmaker "rubber stamps" a recommendation or is a "mere cat's paw" of some other subordinate. *Hill v. Lockheed Martin Logistics Mgm't., Inc.*, 354 F.3d 277, 290 (C.A.4 2004) (en banc). A broader theory of liability that attributes to employers the conduct of every employee that could be said to "cause" the employment decision would be boundless in practice, as numerous employees influence the decisions of even moderately large employers, much less large corporations such as BCI.

B. Under this proper construction of the statute, BCI did not violate Title VII. To the contrary, BCI's conduct is a model of equal employment opportunity; BCI could not have done anything more to comply with the statute. It is therefore not plausible that Congress would have intended to punish BCI for purposeful discrimination.

The relevant decision in this case is the determination to terminate Peters for insubordination. BCI vested Edgar with sole responsibility for that decision. In fact, BCI's policies precluded other officials from taking that action. It is undisputed that Edgar was a race-neutral decisionmaker applying race-neutral policies. There is no claim that bias infected the policies that Edgar was charged with implementing. Grado, by contrast, had no decisionmaking authority to discipline Peters for his conduct, much less to terminate him. The Tenth Circuit did not conclude to the contrary.

C. Nor is there a violation of Title VII on the theory that Edgar "rubber stamped" a decision by Grado or merely acted as his "cat's paw." Edgar made her decision independently of influence by Grado such that it is not appropriate to regard Grado as BCI's "agent" for purposes of Peters's termination. Edgar made the determination that Peters had engaged in subordination. Grado did not recommend that conclusion; indeed, he did not suggest it at all, much less recommend or suggest that Edgar terminate Peters. Edgar had no reason to doubt any of the facts presented to her, which she determined established insubordination. Moreover, she reviewed Peters's personnel file, which served at least two roles. The prior documented instance of insubordination added credibility to the events described by Grado. It also guided Edgar's exercise of judgment in deciding whether to terminate Peters.

II. It does not necessarily follow from the foregoing that an employer is never deemed responsible under Title VII for the conduct of a biased subordinate who had a determinative influence upon an employment decision made by a non-biased agent. The relevant inquiry is whether the employer has established an effective policy for reporting allegations of discrimination and has any reason to suspect that animus infected the relevant decision. The employer is not liable if,

despite its best efforts, it has no reason to believe that some other employee without decisionmaking authority has infected the employment decision with racial bias. This understanding of the statute furthers Congress's overriding goal of encouraging the creation of policies that detect and eliminate discrimination in advance, rather than merely remedying discrimination after the fact through litigation.

Such a claim would properly be asserted as one of negligence, *see Ellerth*, 524 U.S. at 759, and, specifically, a claim that the employer was negligent in its management of biased subordinates. The claim would succeed were the plaintiff to demonstrate that the employer knew or should have known of the discriminatory conduct and that conduct was the proximate cause of the adverse employment action. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000); *Ellerth*, 524 U.S. at 759. When an employer institutes effective policies designed to root out animus among even those subordinates who have not been granted decisionmaking authority, it is fair to conclude that Congress would not have intended to deem those subordinates the employer's "agents" whose discriminatory bias may be imputed to the employer.

A. The EEOC cannot demonstrate that BCI failed to establish an effective system for reporting concerns of discrimination or failed to conduct a proper investigation of charges that Grado was biased. Nor has the EEOC alleged that BCI knew or should have known of Grado's purported bias. Rather, the EEOC's theory is merely that BCI is vicariously liable for the conduct of a biased subordinate.

The record refutes any suggestion that BCI violated Title VII. BCI implemented a comprehensive framework for employees to report discrimination in the workplace. Prior to this lawsuit, neither Peters nor any other employee ever raised any concern that Grado was biased. Peters in

particular did not make such an allegation at the time of his termination or within a reasonable period thereafter that would have enabled BCI to evaluate Peters's charges and ensure that the disciplinary process was not influenced by racial animus.

B. Even if the EEOC had alleged a negligence claim and created a factual dispute as to whether BCI should have known of Grado's alleged bias, BCI could not be liable because no evidence exists showing that Grado's conduct caused Peters's termination. The record lacks any material evidence that Grado's decision to report Peters's insubordination was infected by racial bias. The EEOC's assertions to the contrary rest on a small number of post hoc allegations unrelated to this case that are insufficient to overcome summary judgment. The suggestion that Grado might have provided Edgar with inaccurate information neither undercuts the conclusion that Edgar reached an independent judgment nor rests on facts that were material to her decision.

III. A. The Tenth Circuit erred in concluding that its reading of Title VII was required by the agency-law principle that an employer is liable for conduct of an employee that was "aided by" the agency relationship. This view of "aided by" liability is so expansive as to swallow the limitations that Congress intended to impose in restricting Title VII to the conduct of agents rather than of all employees. Indeed, precisely because "aided by" liability had become pervasively misunderstood in this fashion, the Restatement (Third) of Agency eliminates the concept altogether.

B. The Tenth Circuit's contrary legal standard does not promote the underlying purpose of Title VII. In cases such as this, in which an employee without decisionmaking authority is alleged to have influenced the employment decision, the Tenth Circuit imposed too loose a liability standard and too

onerous a burden on employers. This standard does not comport with Title VII's statutory text or its principal purpose of preventing discrimination in advance rather than compensating victims through litigation. The court of appeals held that liability attaches merely upon a showing of a causal relationship between any employee's biased conduct and an employment decision. Such an extraordinarily expansive rule cannot be reconciled with this Court's holding that Title VII embodies Congress's intent to limit, rather than widen, the scope of the employees whose conduct would be attributable to employers.

The Tenth Circuit further held that an employer can defeat liability if a non-biased employee independently investigates the facts underlying the termination decision. But to the extent Title VII ever requires the more extensive investigation envisioned by the Tenth Circuit—a process in which the decisionmaker must conduct factfinding by directly contacting each of the individuals involved in the process—it does so under much narrower circumstances. The court of appeals required such a burdensome inquiry with respect to every employment decision covered by Title VII, which, for large employers such as BCI, could amount to tens or hundreds of thousands of events—such as decisions with respect to promotions, raises, suspensions, and terminations—every year. That burden is so extraordinary that Congress could not have intended to impose it, particularly because it would fail to focus the employer's attention on the particular subset of cases in which there is some genuine reason to suspect animus. Congress instead sought to facilitate the adoption of effective policies under which employers would encourage and investigate reports of discrimination.

C. The Tenth Circuit erred in concluding that its position was necessary to preclude employers from avoiding liability

through "willful blindness" to the biases of their supervisors. Other courts' standards, as well as BCI's standard, accomplish this goal without the adverse consequences imposed by the Tenth Circuit's standard.

D. BCI prevails even under the Tenth Circuit's standard because the record demonstrates that Grado's alleged bias did not taint Edgar's decisionmaking process.

ARGUMENT

Resolution of the question presented requires this Court to revisit the scope of employer liability under Title VII of the Civil Rights Act of 1964, as codified and amended at 42 U.S.C. sections 2000e(b) and 2000e-2(a). As explained below, based upon this Court's interpretations of these sections, the precedential force of which has been enhanced by Congress, *see Faragher v. City of Boca Raton,* 524 U.S. 742, 792 (1998), the answer to the question presented must be as follows: Title VII liability attaches only to the conduct of the employer, including its agents. *See* 42 U.S.C. § 2000e(b). An employer may be liable for the conduct of its agents acting within the scope of their actual authority, or, specifically, when an adverse employment action is taken by its formal decisionmaker with discriminatory animus. *Faragher*, 524 U.S. at 790; RESTATEMENT (THIRD) OF AGENCY §§ 2.04, 7.03(2) (2006). Similarly, an employer may be liable when a biased subordinate possesses sufficient authority or exerts such a level of influence over the formal decisionmaker that she is principally responsible for the decision or is, in effect, the actual decisionmaker behind the adverse employment action. *Hill*, 354 F.3d at 290; RESTATEMENT (THIRD) AGENCY §§ 2.04, 7.03(1)(a).

An employer may also be liable for discriminatory conduct of non-decisionmakers, but only if it is

negligent—when it knew or reasonably should have known of the subordinate's discriminatory animus—and the protected trait was a determinative influence in the adverse employment action. *See Reeves,* 530 U.S. at 141; *Ellerth,* 524 U.S. at 759; RESTATEMENT (THIRD) OF AGENCY §§ 7.03(1), 7.05(1). The causal chain is broken in this situation when the formal decisionmaker separately evaluates the facts or otherwise makes an independent decision. *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1248–49 (C.A.11 1998); *Shager v. Upjohn Co.*, 913 F.2d 398, 406 (C.A.7 1990).

Here, the Tenth Circuit's conclusion that BCI could be liable for violating Title VII cannot be reconciled with the statute. BCI's employment policies embody everything that Congress sought to accomplish in Title VII. BCI placed decisionmaking authority exclusively in the hands of a human resources professional who was trained in equal employment issues and unquestionably harbored no racial animus. BCI adopted effective policies mandating that employees report concerns regarding workplace discrimination. No employee, including Peters, ever reported any concerns about Grado. BCI accordingly had no reason to believe, despite its very best efforts, that the decisionmaking process had been corrupted by bias. Given that there is nothing more that BCI could have done to comply with Title VII and to ensure that employment decisions were made on a race-neutral basis, it cannot fairly be said that the company engaged in intentional discrimination.

I. BECAUSE TITLE VII APPLIES TO THE CONDUCT OF EMPLOYEES WITH ACTUAL DECISIONMAKING AUTHORITY, BCI MAY NOT BE LIABLE MERELY BECAUSE GRADO MAY HAVE INFLUENCED PETERS'S TERMINATION.

A. An Employer May Be Liable Where an Agent, with Either Formal Authority or Practical Power to Make a Decision, Takes an Adverse Employment Action Against an Employee on the Basis of a Protected Trait.

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an employee. "[T]he very definition of employer in Title VII, as including 'agent,' expressed Congress's intent that courts look to traditional principles of the law of agency in devising standards of employer liability in those instances where liability for the actions of a supervisory employee was not otherwise obvious." *Faragher*, 524 U.S. at 791–92 (citations omitted); *see Ellerth*, 524 U.S. at 754 (stating that "[i]n express terms, Congress has directed federal courts to interpret Title VII based on agency principles"). It is axiomatic that, under the statute, employers may be liable for the actions of their agents under the doctrine of *respondeat superior*, which entails the basic agency principle that "[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment." RESTATEMENT (THIRD) AGENCY § 2.04 (2006); *see id.* §§ 7.03(2), 7.07(1); *see also Ellerth*, 524 U.S. at 755–56 (recognizing Section 219(1) of the Restatement (Second) of Agency (1957)—which is virtually identical to Restatement (Third) of Agency § 2.04—as a "central principle of agency law"). Under this rule, an agent or employee with actual authority to effect a tangible employment decision subjects the employer to liability if she makes the decision

because of the employee's protected trait. Indeed, "there is nothing remarkable" about this "apparently unanimous rule," the basis of which is that, "when a supervisor makes such decisions, he 'merges' with the employer, and his act becomes that of the employer." *Faragher*, 524 U.S. at 790 (citations omitted). Thus, in the typical Title VII vicarious liability case, an employer is accountable for the biased conduct of an agent in whom the employer has vested authority to hire, fire, or take other employment actions. *See, e.g.*, *Ellerth*, 524 U.S. at 762 ("Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control. . . . [A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer.").

Just as well established, however, is that "Congress's decision to define 'employer' to include any 'agent' of an employer...surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (citing 42 U.S.C. § 2000e(b)); *see Faragher*, 524 U.S. at 792 (recognizing the *Meritor* decision as "establishing the rule that some limitation was intended"). By holding that there are limits to an employer's liability under Title VII, this Court rejected any rule that would "impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case." *Meritor*, 477 U.S. at 73; *see Faragher*, 524 U.S. at 792.[7] Vicarious liability does not attach to an employer

---

[7] The EEOC has previously endorsed this position, arguing that "Congress's decision to use the term 'agent,' rather than such words as 'subordinate' or 'supervisory employee,' surely evinces an intent to place

merely because of the discriminatory animus of a supervisor or other employee who has no decisionmaking authority, but whose actions spark an investigation that leads to adverse action against another employee that is otherwise objectively justifiable. Such a position overextends the traditional view of *respondeat superior* liability, and should be rejected.

Certainly, as the Fourth Circuit has held: "the person allegedly acting pursuant to a discriminatory animus need not be the 'formal decisionmaker' to impose liability upon an employer for an adverse employment action, so long as the plaintiff presents sufficient evidence to establish that the subordinate was the one 'principally responsible' for, or the 'actual decisionmaker' behind, the action." *Hill*, 354 F.3d at 288–89 (citing *Reeves*, 530 U.S. at 151–52). As courts addressing this issue universally have recognized, employers should not be permitted to insulate themselves from claims of discrimination by designating formal decisionmakers who are deliberately isolated from employees and thus susceptible to being used as conduits for the racial bias of subordinates. "When a formal decisionmaker acts merely as a cat's paw for or rubber-stamps a decision, report, or recommendation actually made by a subordinate, it is not inconsistent to say that the subordinate is the actual decisionmaker or the one principally responsible for the contested employment action." *Id.* at 290; *see also Llampallas*, 163 F.3d at 1249 ("In a cat's paw situation, the harasser clearly causes the tangible employment action."); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (C.A.5 1996) (stating that if an official decisionmaker "merely 'rubber stamped'" the wishes of others, that decisionmaker would inherit the discriminatory taint); *Shager*,

---

some limits on the acts of employees for which employers under Title VII are to be held responsible." Brief for the United States and the EEOC as Amici Curiae at 16, *Meritor*, 477 U.S. 57 (No. 84-1979).

913 F.2d at 405 ("If [the formal decisionmakers] acted as the conduit of [the employee's] prejudice—his cat's-paw—the innocence of [the decisionmakers] would not spare the company from liability."). Thus, both the *Hill* standard and BCI's proposed standard ensure that actionable discrimination committed by *employers* (as defined by Title VII) is addressed and that the purpose of Title VII is therefore served.

B. The EEOC Cannot Demonstrate That Grado Was the Actual Decisionmaker Responsible For Peters's Termination.

It is undisputed that Edgar was the sole decisionmaker with respect to Peters's termination, and that Grado had no actual authority to terminate employees or even to participate in making such decisions. JA 31, 86–87, 91–92. Nor is there evidence in the record, as there has been in other cases addressing subordinate-bias liability, that Grado had any particular leverage or influence over Edgar, such that he would have been able to impose his will upon her. *See Reeves*, 530 U.S. at 135 (biased subordinate was husband of decisionmaker and wielded "absolute power" within the company); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 221 (C.A.4 2000) (biased subordinate was the son of the employer's CEO who wielded great "informal power" within the company). Indeed, there is no evidence in the record that Grado ever made any attempt to influence Edgar's decision. He did not engage in a lengthy campaign of bringing multiple instances of Peters's deficiencies to the attention of his superiors. *See, e.g.*, *Hill*, 354 F.3d at 283 (allegedly biased safety inspector reporting multiple rules infractions by plaintiff leading to her termination). Nor did Grado make any dramatic gestures, as did the coworker in *Russell* who threatened to quit unless the plaintiff was terminated. *See Russell*, 235 F.3d at 228. He did not "confer" with Edgar about Peters's fate. JA 23, 24. *See Santiago-Ramos v.*

Centennial P.R. Wireless Corp., 217 F.3d 46, 55 (C.A.1 2000) (plaintiff's direct supervisor substantially influencing the termination where he had repeated "daily conference calls" with regional manager regarding plaintiff and was asked for his opinion regarding plaintiff's dismissal). Indeed, it is undisputed that Grado was not asked for his opinion about what should happen to Peters, and he made no recommendations. JA 23, 34. Nor is there any evidence in the record that Grado disparaged Peters during the few, succinct conversations he had with Edgar about the matter.

It is undisputed that Grado's role in these proceedings was actually quite limited. All he did was: (1) ask for help, in advance, from Edgar in handling an employee whom he (correctly) suspected would resist coming in to work on his scheduled day off; and (2) report Peters's subsequent comments and conduct to Edgar over the course of a two-day period, at her request. Moreover, the record is replete with evidence that Edgar did not passively "rubber stamp" a report or recommendation from Grado but, rather, independently evaluated the situation based on her own experience, knowledge of BCI policies, and common sense.[8] For instance, after Edgar learned that Peters had called in sick to Katt, she was not convinced that his claimed ailment legitimately prevented him from working on Sunday. JA 22, 23. She testified that she was suspicious based on the undisputed fact that Peters worked on Friday and then on Monday and was only "too sick to work" on his scheduled day off, and particularly following his unequivocal declaration to Grado that he was not coming in on Sunday. Edgar also found it suspicious that Peters chose to call in sick to Katt

---

[8] BCI respectfully maintains that the Tenth Circuit's assertion that Edgar relied "exclusively" on information provided by Grado in making the decision to terminate Peters, Pet. App. 28a, 30a-31a, is incorrect.

rather than touching base with Grado, given that Grado had warned him Friday he might be terminated if he refused a direct order to come to work. JA 22–23.

Edgar did not confer with Grado this issue or ask his opinion regarding Peters's motivations. Rather, she made her own observations of these undisputed facts and arrived independently at the conclusion that Peters simply had not wanted to work on Sunday and was attempting to dictate the terms of his employment to BCI. JA 22–24. Even if Edgar, an experienced human-resources professional who undoubtedly has dealt with numerous similar factual scenarios, turned out to be wrong about Peters, as the Tenth Circuit summarily concluded, Pet. App. 28a, it would be immaterial.[9] The relevant inquiry is not whether BCI's proffered reasons were "wise, fair or correct" but whether BCI "honestly believed those reasons and acted in good faith upon those beliefs." *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1318 (C.A. 10 1999), *overruled on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *see Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677 (C.A.7 1997) ("[A]rguing about the accuracy of the employer's assessment [of the plaintiff's performance] is a distraction, because the question is not whether the employer's reasons for a decision are *right* but whether the

---

[9] In concluding that Edgar was "wrong" about Peters, the Tenth Circuit placed undue emphasis on the doctor's note obtained by Peters, *after he was terminated*, accepting this as conclusive proof that Edgar was mistaken about Peters being unable to work on Sunday. JA 293. In any event, the fact that Peters called in sick, or was actually sick, is ultimately immaterial, as he made clear to Grado on Friday he was not coming to work on Sunday, regardless of his health status. After all, even if he had been physically able to work on Sunday, he still had to attend to his "plans." JA 70,71.

employer's description of its reasons is *honest*."(citations omitted)). As the district court recognized, a court must view the matter from Edgar's perspective, examining the facts as they appeared to her, and determine whether she honestly believed her stated reasons, not whether she was "right." Pet. App. 57a–58a.

Not only did Edgar exercise her own judgment, she also took an additional affirmative step to independently investigate the situation, by reviewing Peters's personnel file.[10] JA 21. She found therein an account of a showdown between Peters and his former supervisor that echoed the one relayed by Grado.[11] JA 60–61. The file also revealed that Peters had been given a "final warning," an administrative determination that further instances of insubordination would result in his termination. *Id.* The information in the file corroborated Grado's account, and bolstered Edgar's determination that the correct course of disciplinary action was to terminate Peters.

Based on these undisputed facts, it is simply not reasonable to conclude—as the EEOC has insisted throughout

---

[10] Although the Tenth Circuit suggests that Edgar acted irresponsibly by failing to expand her investigation to ask Peters for his version of the phone conversation with Grado, Pet. App. 28a, it fails to identify what exactly Peters could honestly have told Edgar which would have made any difference whatsoever to her deliberative process. Indeed, even if it were true that Grado was blatantly racist, and even had Peters told Edgar as much during the course of an expanded investigation, this fact would not have made Grado's need for Peters to work on Sunday any less pressing, nor would it have rendered Peters's refusal of a direct order to come to work, by saying "do what you have to do," any less insubordinate.

[11] The Tenth Circuit's depiction of Grado as the sole source of information upon which Edgar based her termination decision also completely ignores Peters's prior history of insubordination, which played a significant role in Edgar's decision to terminate. JA 22.

this case—that Edgar was a mere dupe, or "cat's paw," subject to Grado's racially motivated orchestrations.

II. BCI ALSO FULLY COMPLIED WITH TITLE VII BECAUSE EEOC DOES NOT ALLEGE THAT BCI WAS NEGLIGENT AND DID NOT SHOW THAT GRADO'S CONDUCT CAUSED PETERS'S TERMINATION.

A final avenue for Title VII liability is the agency law principle that an employer is directly liable to "a third party harmed by an agent's conduct when . . . the principal is negligent in selecting, supervising, or otherwise controlling the agent." RESTATEMENT (THIRD) OF AGENCY § 7.03(1)(b); *see also id.* at § 7.05(1). This inquiry, however, remains focused on the "employer." The relevant question is whether biased conduct of a non-decisionmaking employee can be attributed to the employer. That question should be answered by determining whether the employer made sufficient efforts to root out animus in the workplace, including by establishing and enforcing an effective policy for reporting and investigating claims of bias. An employer is not liable under the statute if it has established an effective system for reporting allegations of bias and has no reason to suspect that animus infected the relevant decision.

In defining negligence, the Court has stated that an employer is negligent "when it knew or should have known about the conduct." *Ellerth*, 524 U.S. at 759; *see also id.* at 770 (Thomas, J., dissenting) (stating that "[t]he most that employers can be charged with, therefore, is a duty to act reasonably under the circumstances"). In the subordinate liability context, therefore, an employer (acting through its formal decisionmaker) is negligent when it knew or should have known that the subordinate was biased or it engaged in conduct for discriminatory reasons. This standard presents a reasonable balance between this Court's holding that "absence of notice to an employer does not necessarily insulate that

employer from liability" and its holding that Congress's intent was "to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Meritor*, 477 U.S. at 72.

A finding of negligence on the part of an employer because it knew or should have known of a subordinate's discriminatory animus, however, does not end the liability inquiry. Rather, as with any other tort, it is the plaintiff's burden to prove that the employer's negligence was the proximate cause of the adverse employment action. *See Reeves*, 530 U.S. at 141 (stating that the employee's protected trait must have "had a determinative influence on the outcome"); *Ellerth*, 524 U.S. at 759 (stating that "an employer can be liable . . . where its own negligence is a cause of the harassment"). In other words, a plaintiff relying on this aspect of the standard must show not only that the employer knew or should have known about the bias, but also that the bias translated into some action that caused the adverse employment decision or was otherwise a determinative influence on the outcome. Without limiting the ways that a plaintiff can meet her causation burden, in the context of subordinate-bias liability she must at least produce sufficient evidence to show that the formal decisionmaker failed to separately evaluate the facts or otherwise failed to make an independent decision. *See, e.g., Llampallas*, 163 F.3d at 1249 (stating that causation is not established when the formal decisionmaker "herself evaluat[es] the employee's situation"); *Willis* v. *Marion County Auditor's Office*, 118 F.3d 542, 547 (C.A.7 1997) (stating "it is clear that, when the causal relationship between the subordinate's illicit motive and the employer's ultimate decision is broken, and the ultimate decision is clearly made on an independent and a legally permissive basis, the bias of the subordinate is not relevant"); *Shager*, 913 F.2d at 406 (stating that "there would

be no ground for finding even an innocent violation of the Act" if the decisionmaker "made an independent decision to fire Shager").

This understanding of Title VII furthers Congress's overriding goal of encouraging the creation of policies that detect and eliminate discrimination in advance, rather than encouraging plaintiffs to seek redress in court. Title VII's "primary objective is not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 806; *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (Title VII's purpose is "a prophylactic one")); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("[T]he language of Title VII . . . makes plain the purpose of Congress to . . . eliminate those discriminatory practices and devices which have fostered racially stratified job environments . . . ."). As this Court has observed:

> Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context. . . . To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.

Ellerth, 524 U.S. at 762 (citations omitted). An interpretation of Title VII that instead shunts the focus to litigation would undermine "the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit . . . to employers who make reasonable efforts to discharge their duty." *Faragher*, 524

U.S. at 775. Similarly, "such linkage of liability limitation to effective preventive and corrective measures could serve Title VII's deterrent purpose by encouraging employees to report harassing conduct before it becomes severe or persuasive." *Penn. State Police v. Suders*, 542 U.S. 129, 145 (2004) (citations and quotations omitted).

"Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII." *Kolstad*, 527 U.S. at 545 (citations omitted). Employers contemplating the enactment of new policies would be encouraged by a liability rule rewarding them for their efforts. Tying liability to the existence of such policies would also encourage employers to strengthen current policies to combat discrimination and address employee grievances. Overall, promoting strong and effective grievance procedures complements Title VII's primary purpose of preventing discrimination in advance rather than merely remedying it after the fact. As this Court stated in *Suders*, "[t]ying the liability standard to an employer's effort to install effective grievance procedures would advance Congress' purpose 'to promote conciliation rather than litigation' of Title VII controversies." 542 U.S. at 145 (quoting *Ellerth*, 524 U.S. at 764). Absent effective procedures, "the temptation to litigate would be hard to resist . . . ." *Faragher*, 524 U.S. at 805.

Encouraging employees who believe they have been victims of alleged discrimination to raise their allegations promptly and directly with the employer is also consistent with the general damages principle that a victim has a duty to avoid or minimize damages. *See Faragher*, 524 U.S. at 775. A leading treatise has summarized the rule as follows: "Where one person has committed a tort . . . against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the

damages. The person wronged cannot recover for any item of damage which could thus have been avoided." C. MCCORMICK, LAW OF DAMAGES 127–58 (1935). *Faragher* applied this principle to the employer liability context and explained:

> If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.

524 U.S. at 806–07; *see also Ellerth*, 524 U.S. at 764 ("Title VII borrows from tort law the avoidable consequences doctrine."); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982) (explaining the tort doctrine of avoidable consequences).

In situations where the employer takes reasonable measures to root out animus among all employees, including those subordinates who have not been granted decisionmaking authority, it is fair to conclude that Congress would not have intended to deem those subordinates the employer's "agents" and attach to the employer the label of "discrimination." Accordingly, absent sufficient evidence that the employer knew or should have known of the subordinate's bias and that the subordinate's conduct caused the adverse employment action, *see Ellerth*, 524 U.S. at 759; *Reeves*, 530 U.S. at 141, then there is no employer liability under Title VII.

A. The EEOC Cannot Make Out a Claim That BCI Made Insufficient Efforts to Identify and Investigate Claims of Bias by Employees Such as Grado.

The record demonstrates that BCI fully complied with Title VII. BCI adopted and implemented a broad-based employee complaint system for employees to report incidents of discrimination. BCI educated its employees regarding Title VII and other anti-discrimination laws, distributed anti-discrimination policies, and provided avenues for employees to submit complaints of discrimination. JA 24–27. BCI also distributed workplace conduct policies, so that all of its employees would know the rules, and gave trained human resources personnel, such as Edgar, sole authority to make termination decisions in order to ensure that these rules were enforced in a consistent and race-neutral fashion. JA 18, 24–28, 45. The EEOC has presented no evidence demonstrating that BCI's policies were not enforced, or were otherwise ineffective.

Although BCI undertook considerable efforts to ensure that complaints of discrimination could, and would, be brought to the attention of the company, it is undisputed that the preventative mechanisms which BCI put in place were not used in this case to alert the company that it employed a potentially racially biased supervisor. No one—including Peters and the other EEOC affiants who belatedly stepped forward to call Grado a racist—ever made such complaints to BCI prior to Peters's termination. JA 49, 193–201. Nor did Peters take advantage of this system during his termination process or within a reasonable time thereafter. Peters could have avoided the harmful effect of termination by promptly raising his complaint of supervisor discrimination with BCI at any point prior to termination or at a reasonable point thereafter. He did not do so. Rather, he elected to raise his allegations only through the Title VII process in the first

instance. Such behavior does not "effect Congress' intention to promote conciliation rather than litigation . . . ." *Ellerth*, 524 U.S. at 742. Moreover, given Peters's failure to alert BCI to the possibility of race discrimination, it unreasonable to expect BCI to have divined some hidden discriminatory intent on the part of Grado.

B. Grado's Conduct Did Not Cause Peters's Termination.

Even if there were an issue of disputed fact as to whether BCI failed to establish anti-discrimination policies or appropriate reporting mechanisms or that it otherwise should have known of Grado's alleged bias, BCI is not liable under Title VII because there is no evidence that Grado's supposed racial bias translated into any action which had a determinative influence on Edgar's decision.

The district court correctly found that there was no evidence of selective reporting by Grado nor any indication that Grado passed along misleading or incomplete information. *See* Pet. App. 63a (stating that "[t]here was no evidence . . . either before Edgar or before this Court, to raise the inference that Grado relayed misleading information to Edgar). To the contrary, the evidence is that Peters engaged in the conduct that BCI attributes to him." Any racial animus notwithstanding, Grado did nothing more than tell Edgar the truth. The Tenth Circuit agreed that Peters's statements to Grado during the course of their conversation on September 28, 2001, as accurately relayed by Grado, "could only be interpreted as defiance," but insisted that Grado also reported "several additional facts" about his conversation with Peters that tainted Edgar's perception of events. Pet. App. 29a. These additional "facts," however, are nothing more than minor, immaterial discrepancies that do not create a dispute as to whether Grado accurately depicted Peters's undeniably insubordinate conduct to Edgar.

First, Grado did tell Edgar that he understood that Peters was "planning to call in sick," based on what Katt told him, whereas Peters denies saying this to Katt. JA 107. It is undisputed, however, that Katt told Grado that Peters would likely resist coming to work on Sunday. JA 100–01. The difference between these two versions of Peters's behavior, and the likely impact of one version versus the other on Edgar's perception of the situation, can only be viewed as *de minimis*, particularly in light of the fact that Peters ultimately refused to come to work on Sunday in defiance of Grado's direct order. Moreover, Peters admitted that he told Grado, on Friday, that he could not come to work Sunday in part because he "was not feeling well," which of course amounted to Peters calling in sick two days in advance, in contradiction of company policy. JA 70–71. The fact that he called in sick (again) to Katt within a proper timeframe does not change the fact that he had already unequivocally told Grado he was not coming to work. Edgar could hardly have been improperly influenced by being presented with speculation regarding Peters's conduct, which, even if unfounded at the time, turned out to be true.

Likewise, the parties' disagreement as to whether Peters responded to Grado's inquiries by telling Grado that his plans were "none of [his] business" is also immaterial. It is undisputed that Peters told Grado that he could not come to work on Sunday in part because he had "plans" and that Peters offered no explanation to Grado as to the nature of his "plans," even when told he might be terminated for insubordination. JA 70, 71. There is no evidence that Grado cut off an attempt by Peters to provide such an explanation—rather, Peters testified that he was the one who ended the conversation. JA 71, 105. Thus, the differences in the parties' versions of what Edgar was given to understand regarding Grado's attempts to probe Peters about his "plans"

are *de minimis* and immaterial in light of Peters's other undisputed insubordinate statements (as accurately conveyed by Grado) during the course of the conversation. Finally, there is no dispute that Grado accurately told Edgar, in response to her inquiries on Monday, that Peters did not come to work on Sunday and that Peters made no attempt to contact him over the weekend.[12] It is also undisputed that Grado told Edgar that Peters had called in sick to Katt. JA 21–22, 34.

The Tenth Circuit made much of the supposed dispute over whether Grado told Edgar about Peters calling in sick to Katt before she made the decision to terminate Peters. Even if there were a bona fide dispute on this issue (which BCI denies), and even supposing Edgar were mistaken (or lying) and she did not receive this information until after she made her decision to terminate Peters, such supposition would in no way be relevant to the only matter at issue; namely, whether Grado's alleged racial bias tainted Edgar's decisionmaking process. There is no evidence in the record that Grado knew Peters had called in sick to Katt prior to learning this fact from Katt, nor is there any evidence that he concealed this information or delayed reporting this information to Edgar after receiving it. In other words, it is undisputed that Grado, the only source of alleged racial bias in this case, acted blamelessly with respect to this issue, reporting this news to

---

[12] The Tenth Circuit noted that Katt testified that he paged Grado several times to notify him that Peters had called in sick, but Grado "for some reason" failed to return the pages, Pet. App. 6a, once again improperly drawing a negative inference from a totally immaterial fact. There is absolutely no evidence in the record that Grado's failure to return Katt's page was caused by a discriminatory motive or had anything to do with Peters. Indeed, Katt testified that it was not uncommon for Grado not to return his pages on a weekend. JA 96.

Edgar as soon as he received it, and at whatever point that fell in Edgar's decisionmaking process.

In addition, Edgar testified that Peters's call to Katt on Saturday night had no impact whatsoever on her assessment of Peters's conduct or her termination decision. JA 22–23. Thus, whether she learned this fact before or after her termination decision is immaterial. Indeed, she was certainly free to revisit her termination decision after receiving this information from Grado, but (still unaware of his race) she chose not to do so.[13]

Furthermore, there is no evidence that Grado's conduct was infected by his supposed racial bias. There is no evidence that Grado's decision to ask Peters to work or to contact Edgar for help in dealing with Peters regarding this issue was attributable to racial bias. There is no dispute that Grado was in a dire situation with respect to route coverage on Friday, September 28, 2001—even the Tenth Circuit referred to Grado's problem as a "serious scheduling crunch." Pet. App.

---

[13] In determining that BCI's stated reasons for terminating Peters could be deemed pretextual, the Tenth Circuit focused on yet another factual red herring by repeating Peters's allegations that, at his termination meeting on Tuesday, October 2, 2001, "the key players in the decision fell silent upon hearing that Peters's absence was excused, suggesting that they were indeed surprised by the news." Pet. App. 28a. This statement is immaterial and, upon close examination, completely illogical. The only individuals in attendance at the termination meeting were Peters, Grado, Pedersen, and another manager. Edgar did not attend. The Tenth Circuit found that both Grado and Edgar learned about Peters calling in sick from Katt on Monday evening. Pet. App. 7a–8a. Thus, neither Grado nor Edgar (had she attended the termination meeting) would have been "surprised" to hear this same news from Peters on Tuesday morning. Nor is it relevant (much less probative of pretext) as to whether the other attendees were "surprised" by the news, since it is undisputed that they did not take part in the termination decision.

3a. All but one of the merchandisers under Grado, most of them white or Hispanic, worked overtime during the week in question, and many worked more hours than Peters. JA 38–41. That Grado called upon Peters as a last resort in the face of real need is borne out by the undisputed fact that, when Peters refused to come in, Grado ended up covering the routes himself. JA 34, 252.

Nor does any evidence suggest that Grado contacted Human Resources because Peters was African-American. Although the EEOC presented evidence of other employees who arguably received more lenient treatment from Grado, these examples were not comparable because they did not involve multiple acts of insubordinate refusal to obey a direct order,[14] *see* Record at 74, PSOF Fact Nos. 10, 18, 46, 48, and the district court correctly concluded that these individuals were not "similarly situated" to Peters. Pet. App. 73a–75a.

Moreover, the contention that Grado was more lenient in reporting the offenses of Hispanic employees,[15] even if true,

---

[14] For instance, there is evidence that an Hispanic merchandiser told Katt that she would come in to work on her day off, but did not show up, and that another Hispanic merchandiser failed to return Grado's page despite being ordered to do so, due to the fact he had voluntarily abandoned his job, unbeknownst to Grado. As the Tenth Circuit acknowledged, however, there are significant factual differences among these scenarios. Pet. App. 25a. Neither of these employees responded to a direct order from Grado by telling him to "do what he had to do," nor did Grado face an imminent coverage issue during the time periods in question or have any other pressing reason (as he did with Peters) to get Human Resources involved in the situation. JA 35-36.

[15] The Fourth Circuit has stated, compellingly, that an employer should not be denied summary judgment when a biased subordinate brings an employee's undisputed infractions to light, even though "the violations

is irrelevant, as it misconstrues the undisputed purpose and nature of Grado's communications with Human Resources regarding Peters. Grado did not initiate communications with Edgar on Friday, September 28 for the purpose of "reporting" that Peters had been insubordinate. Rather, it is undisputed that Grado spoke to Edgar *before* he ever talked to Peters, for the purposes of seeking advice on whether he could require Peters to come to work, and how to frame his communications with Peters on this issue. JA 18–19, 33. Nor is there any evidence in the record to suggest that Grado made an unwarranted, racially biased assumption that Peters would resist coming to work or that Grado simply fabricated a speculation that Peters would resist coming to work in order to paint Peters in a negative light to Edgar. Rather, it is undisputed that Katt told Grado Friday afternoon that Peters would likely resist coming to work. JA 100–01. And, of course, Peters *did* resist coming to work. In short, as the district court recognized, there is no evidence in the record to suggest that, notwithstanding his supposed racial bias, Grado acted inappropriately in obtaining help from Human Resources in dealing with Peters, or handled the situation with Peters differently than he would have with any other employee under similar circumstances. *See* Pet. App. 67a.

---

might not have been known in the absence of a subordinate's discriminatory animus . . . ." *Hill*, 354 F.3d at 296. Otherwise, an unbiased employer could never discipline an employee for undisputed violations of company rules, including egregious acts such as fighting and stealing, "so long as the employee could demonstrate that she was 'turned in' by a subordinate employee 'because of' a discriminatory motivation." *Id.*

III. THE TENTH CIRCUIT'S MORE EXPANSIVE THEORY OF LIABILITY LACKS MERIT.

A. The Tenth Circuit's Decision Misapplies Supreme Court Precedent to Expand an Employer's Vicarious Liability Beyond the Bounds Necessary to Serve the Purposes of Title VII.

The Tenth Circuit derived its view of an employer's vicarious liability for the actions of non-decisionmakers from the provision of the Restatement (Second) of Agency which provides that an employer will be held vicariously liable for the actions of a servant where the servant is "aided in accomplishing the tort by the existence of the agency relation." Pet. App. 16a (citing *Ellerth*, 524 U.S. at 758 (quoting Restatement (Second) of Agency § 219(2)(d) (1957))). The court of appeals, however, dramatically overread the "aided-in" theory of agency.

Under the Restatement (Second) of Agency, a "master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: . . . (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957). The comments to this subsection illustrate that this theory of liability was limited to situations involving misrepresentation or deceit. *Id.*, cmt. e. Indeed, "[a]lthough technically separate from apparent authority, the aided-by-agency-relation basis for vicarious liability was intended to apply to similar cases—those involving deceit or misrepresentation, which involve reliance by the plaintiff on the agency relationship." Daniel M. Combs, Casenote, Costos v. Coconut Island Corp.: *Creating a Vicarious Liability Catchall Under the Aided-By-Agency-Relation Theory*, 73 U. COLO. L. REV. 1099, 1104 (2002) (citing

WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY 162 (1964)). In short, "[a]n analysis of the text and drafting history of section 219(2)(d) indicates that despite its open-ended language, the aided-by-agency relation basis for vicarious liability properly applies only in cases involving reliance and deceit." *Id.* at 1103; *see also Ellerth*, 524 U.S. at 772 (Thomas, J., dissenting) (stating that, "as demonstrated by the Restatement's illustrations, liability under § 219(2)(d) depends upon the plaintiff's belief that the agent acted in the ordinary course of business or within the scope of his apparent authority"); *Mahar v. StoneWood Transp.*, 2003 ME 63, 823 A.2d 540 (Me. 2003).

Application of the aided-in-agency prong of section 219(2)(d) without requiring the existence of apparent authority, and thus reliance by the plaintiff, "would make the scope of employment requirement largely superfluous because in almost every case where the tort is within the scope of employment the tortfeasor will have been aided in commission of the tort by the agency relationship." Paula J. Dalley, *All in a Day's Work: Employers' Vicarious Liability for Sexual Harassment*, 104 W. VA. L. REV. 517, 550 (2002). In *Ellerth*, this Court recognized this problem, stating that, "[w]ere this to satisfy the aided in the agency relation standard, an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment." 524 U.S. at 760. While therefore applying this doctrine in a limited circumstance, this Court "hesitate[d] to render a definitive explanation of [the Court's] understanding of the standard in an area where other important considerations must affect [the Court's] judgment"—namely, "that agency principles constrain the imposition of vicarious liability." *Id.* at 763.

Indeed, the "aided-in" language of the Second Restatement has been so widely misconstrued by the courts

that the Third Restatement has simply abandoned it. While in 1998 the doctrine of "aided-in-agency" vicarious liability was a "developing feature of agency law," *Ellerth*, 524 U.S. at 763, the Restatement (Third) of Agency has now reversed that development. The drafters of the Restatement (Third) recognized that "[i]nterpreting 'aided in accomplishing the tort by the existence of the agency relation' beyond situations in which an employee purports to speak or transact on behalf of the employer has the potential to expand an employer's vicarious liability well beyond the established boundaries of the scope-of-employment test." RESTATEMENT (THIRD) OF AGENCY § 7.08, Rptrs. Note b. Because of the fear of improperly expanding liability, "[t]his Restatement does not include 'aided in accomplishing' as a distinct basis for an employer's (or principal's) vicarious liability." *Id.* cmt. b. Instead, "[t]he purposes likely intended to be met by the 'aided in accomplishing' basis are satisfied by a more fully elaborated treatment of apparent authority and by the duty of reasonable care that a principal owes to third parties with whom it interacts through employees and other agents." *Id.* § 7.08, cmt. b (citing Restatement (Third) of Agency § 7.05, which imposes liability on a principal for its negligence).

As the revisions to the Restatement evince, the Tenth Circuit's use of a broad "aided-in-agency" theory is misplaced. The Tenth Circuit should have relied, not on the Restatement provision cited in *Ellerth*, but on *Ellerth* itself, which disclaimed any intention of incorporating the Second Restatement into Title VII law. *Ellerth* recognized at the outset of its analysis that the "aided-in-agency" principle could not apply in every case that came within the literal terms of the Restatement provision, for to do so would make the employer liable for every act of co-worker harassment, a result the Court dismissed out of hand. *Ellerth*, 542 U.S. at 760. *Ellerth* simply held that an employer is vicariously

liable for the actions of its employees who have the actual power to make decisions (with the caveat that an employer that creates an effective grievance procedure may avoid even some of this liability). In doing so, it noted that as applied in the Title VII context, the law of agency should be moderated where useful to serve to purposes of the statute. *Id.* at 763. In particular, *Ellerth* noted that "Title VII is designed to encourage the creation of antiharrassment policies and effective grievance mechanisms." *Id.* at 764. "Were employer liability to depend in part on an employer's effort to create such procedures," the Court found, "it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, and the EEOC's policy of encouraging the development of grievance procedures." *Id.* (citations omitted).

Neither *Ellerth* nor the purposes of Title VII suggest that vicarious liability should be imposed here. Grado undisputedly did not have actual decisionmaking authority. If Grado's reporting of Peters to Edgar was motivated by discriminatory intent, that reporting can fairly be said to have been "aided by" his job responsibilities. But the report is not the focus of the complaint or of the Title VII inquiry. The allegedly unlawful action is the termination decision, and that decision was made by Edgar, not Grado. Under *Ellerth*, it is only Edgar, the decisionmaker, who acts on behalf of the company and who could subject it to liability.

B. The Tenth Circuit's Standard of Liability Overburdens Employers.

The Tenth Circuit did not fundamentally misunderstand the basic approach to subordinate bias liability. At one end of the spectrum of liability, the court of appeals correctly recognized that employers should be liable when decisionmakers "rubber stamp" decisions of biased subordinates. At the opposite end, the Tenth Circuit also

correctly recognized that employers should not necessarily be held liable when the plaintiff's allegation is merely that one link in the chain of decisionmaking was tainted by bias. But the Tenth Circuit erred by adopting a standard that is not attentive to the limits on the range of employees whose conduct will be attributable to employers and by imposing too onerous a burden that does not comport with the principal purpose of Title VII to prevent discrimination in the first instance rather than compensating victims through litigation.

The Tenth Circuit adopted a vicarious liability standard that looks merely to causation. The court held that employers are liable under Title VII when "the actions of [a] biased subordinate caused the employment action." Pet. App. 21a. In support of its view that causation was the relevant standard, the court cited *Ellerth*'s assertion that Title VII "'accommodate[s] the agency principle of vicarious liability for harm *caused by* misuse of supervisory authority.'" Pet. App. 19a (emphasis in original) But the supervisor in *Ellerth* was the actual decisionmaker and this Court merely indicated that when the decisionmaker misuses her authority and thereby causes harm, the company should be vicariously liable. *Ellerth* did not adopt the far broader holding that a sufficient agency relationship for purposes of Title VII arises whenever an employee "causes" harm. Indeed, as noted *supra*, *Ellerth* explicity rejected that proposition when it noted that too broad a reading of agency law would impose vicarious liability on employers for co-worker harassment. The Tenth Circuit's standard renders an employer liable for the conduct of a virtually boundless body of employees, directly contrary to this Court's insistence that Congress instead intended to place limits on the classes of employees who would be deemed agents for purposes of Title VII.

The Tenth Circuit separately held that the causal relationship could be defeated by an independent investigation

of the facts giving rise to the employment decision by a non-biased employee. The Tenth Circuit required that inquiry with respect to *every* employment decision covered by the statute, including promotions, raises, suspensions, and terminations. It is fair to assume that several of these decisions will likely be made with respect to each employee during the course of each year. And for large corporations, with tens or hundreds of thousands of events each year, the burden would be potentially crushing. That burden is so extraordinary that Congress could not have intended to impose it. Congress instead sought to facilitate the adoption of effective policies under which employers would encourage reporting and investigate reports of concerns of racial and gender bias. *Kolstad*, 527 U.S. at 545; *Faragher*, 524 U.S. at 806; *Ellerth*, 524 U.S. at 764.

The standard for subordinate-bias liability as articulated and applied by the Tenth Circuit particularly places an undue burden on human resources personnel and others charged with investigating allegations of employee wrongdoing. In effect, the Tenth Circuit standard requires investigators such as Edgar to assume that an unlawful motive lurks behind every report or complaint of employee misconduct, and, essentially, compels the performance of multiple investigations into the motives of each witness within the scope of the overarching investigation of the claim of misconduct. The Tenth Circuit also, in effect, requires a decisionmaker to always elicit the accused employee's "side of the story" prior to taking disciplinary action. Pet. App. 21a, 28a, 31a. Speaking directly with the accused employee is certainly a desirable and appropriate step in many, perhaps most, investigations of claims of workplace misconduct. There are situations, however, such as presented in the case at bar, where such a step is unnecessary. The choice of the method by which to investigate a particular claim of workplace misconduct is best

left to the discretion of the individuals who are assessing the circumstances of each complaint, rather than to courts acting as "super personnel departments," picking apart investigations months and years after the fact.[16]

Furthermore, a standard that sets a minimum requirement for an ideally comprehensive investigation ignores the realities of day-to-day human resources administration. Human resources personnel such as Edgar, whose area of responsibility included well over a thousand employees, JA 24, cannot reasonably be expected to perform the same level of investigation for each complaint. They must prioritize and use their judgment to determine how much time and attention to devote to each complaint. For instance, complaints involving allegations of race discrimination, sexual harassment, or "whistle blowing" on corporate misconduct obviously merit a more comprehensive investigation than a complaint about an employee who does not want to come to work on his scheduled day off. The imposition of uniform requirements for each investigation will have the opposite of its intended effect—backlogging investigations and delaying resolution of complaints touching on important issues, including issues implicating Title VII and other anti-discrimination laws.

Companies such as BCI expend considerable resources developing non-discriminatory policies and hiring and training

---

[16] It is well settled that courts may not act as a "super personnel departments" that second-guess employers' business judgments. *See, e.g., Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 628 (C.A.6 2006); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1052 (C.A.8 2006); *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1197 (C.A.10 2006); *Holcomb v. Powell*, 433 F.3d 889, 897 (C.A.D.C. 2006); *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1181 (C.A.7 2002), *cert. denied*, 537 U.S. 884 (2002).

personnel exclusively dedicated to conducting workplace investigations and to consistently enforcing such policies. For smaller companies, the expense of maintaining centralized decisionmaking and investigative functions is likely proportionally even more burdensome. If liability may be premised upon the discriminatory motive of a non-decisionmaking individual who merely invokes a centralized investigative process, provides information, or plays any role whatsoever in a workplace investigation where he or she may be deemed to have influenced the decision, the incentive for employers to implement, as a preventative measure, a centralized decisionmaking process is greatly reduced. For example, an employer may question why it should continue to retain and entrust decisions to a neutral investigator if it will be held liable based on the discriminatory motive of a subordinate employee. In essence, the human resources professional—the one with the most training in anti-discrimination policies—becomes an unnecessary component in the workplace. Conversely, the standard proposed by BCI, which correctly places the focus on the discriminatory animus of true decisionmakers and agents of the company, encourages employers to develop dedicated human resources functions and to provide additional support and resources to their current human resources personnel.

C. The Tenth Circuit's Standard Is Not Necessary to Prevent Employers from Remaining Willfully Blind to the Discriminatory Actions of Their Subordinates.

The Tenth Circuit incorrectly concluded that its position was necessary to preclude employers from avoiding liability through "willful blindness" to the biases of supervisors. Pet. App. 18a. Other courts—applying different standards—have universally recognized that employers should not be permitted to insulate themselves from claims of discrimination by designating formal decisionmakers who are deliberately

isolated from employees and thus susceptible to being used as conduits for the racial bias of subordinates. *See Hill*, 354 F.3d at 290–91 (stating that "[s]uch a construction of those discrimination statutes would thwart the very purposes of the acts") (citing *Reeves*, 530 U.S. at 151–52).

BCI's proposed standard likewise does not permit such a result. Rather, BCI's standard permits a finding of liability in a case where an employer should have known about a subordinate's bias, even if the actual decisionmaker were wholly ignorant of any unlawful motive. In addition, BCI's proposed standard accords with the views of all courts that have addressed this issue, in that it ensures that employers will be held accountable in the true "rubber stamp" or "cat's paw" scenario—that is, a case where the biased subordinate exerts a level of influence, with no independent evaluation by the formal decisionmaker, such that the subordinate becomes the actual decisionmaker. The Tenth Circuit's causation standard therefore, is not necessary to accomplish this goal.

D. BCI Prevails Even Under the Tenth Circuit's Expansive Standard Because the Record Does Not Suggest That Edgar's Decisionmaking Process Was Tainted by Discrimination.

For the reasons set forth in Section II(B), *supra*, BCI prevails even under the Tenth Circuit's standard, for the summary judgment record demonstrates that Grado's alleged bias did not taint Edgar's decisionmaking process. Although the Tenth Circuit suggested that "[a] biased low-level supervisor with no disciplinary authority might," under any stricter rule than the one it adopted, "effectuate the termination of an employee from a protected class by recommending discharge or by selectively reporting or even fabricating information in communications with the formal decisionmaker," Pet. App. 18a, there is simply no suggestion that any such taint impacted Edgar's decision. Peters came to

the attention of the BCI Human Resources Department because a BCI manager desperately needed him to come to work. Human Resources remained involved in the situation because Peters refused to come to work, defying a direct order of his supervisor.

BCI's designated agent, Edgar, assessed the situation based on her experience and training and applied BCI's written policies without regard to Peters's race. The undisputed evidence demonstrates that Edgar utilized a race-neutral process in making a legitimate business decision. Congress did not intend for employer liability under Title VII to include this situation; rather, it intended to promote this process.

CONCLUSION

For the foregoing reasons, the Tenth Circuit's decision should be reversed with instructions to affirm the district court's decision awarding summary judgment in favor of BCI.

Respectfully submitted,

ERIC TODD PRESNELL
Counsel of Record
KARA E. SHEA
T. HAROLD PINKLEY
DAVID L. JOHNSON
MILLER & MARTIN PLLC
1200 ONE NASHVILLE PLACE
150 FOURTH AVENUE NORTH
NASHVILLE, TENNESSEE 37219
615-244-9270

THOMAS C. GOLDSTEIN
AKIN GUMP STRAUSS HAUER
& FELD LLP
ROBERT S. STRAUSS BUILDING
1333 NEW HAMPSHIRE AVENUE, NW
WASHINGTON, D.C. 20036
202-887-4060

A 478a

(13)

No. 06-341

FILED
MAR 27 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

PAUL D. CLEMENT
Solicitor General
Counsel of Record
GREGORY G. GARRE
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

RONALD S. COOPER
General Counsel
LORRAINE C. DAVIS
Acting Associate General Counsel
SUSAN R. OXFORD
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, and in what circumstances, an employer can be liable for racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, based on the alleged bias of a supervisor, where the supervisor did not take the adverse employment action himself but is alleged to have caused that action.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Summary of argument 12
Argument:
An employer is liable under Title VII when a supervisor acting with a discriminatory motive uses delegated authority to cause a tangible employment action such as a discharge 15
A. Under agency principles, an employer is vicariously liable when a discriminatorily motivated supervisor uses delegated authority to cause a tangible employment action 16
B. Petitioner's effort to limit employer liability to the acts of "actual decisionmakers" and to employer negligence is inconsistent with agency principles 24
C. Causation is established when a supervisor's discriminatorily motivated misuse of delegated authority is a substantial factor in bringing about a tangible employment action 29
D. An employer's independent investigation can break the chain of causation 33
E. Because a reasonable factfinder could conclude that petitioner discharged Peters because of his race, petitioner was not entitled to summary judgment 35
Conclusion 41

TABLE OF AUTHORITIES

Cases: Page

Albermarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 22
Anderson v. *Liberty Lobby, Inc.*, 447 U.S. 242 (1986) ... 36
Anza v. *Steel Supply Corp.*, 126 S. Ct. 1991 (2006) 32
Burlington Indus., Inc. v. *Ellerth*, 524 U.S. 742 (1998) ..... *passim*
Clark County Sch. Dist. v. *Breeden*, 532 U.S. 268 (2001) 31
Desert Palace, Inc. v. *Costa*, 539 U.S. 90 (2003) 30
Faragher v. *City of Boca Raton*, 524 U.S. 775 (1998) ..... *passim*
Hartman v. *Moore*, 126 S. Ct. 1695 (2006) 31
Hazen Paper Co. v. *Biggins*, 507 U.S. 604 (1993) 31
Hill v. *Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004), cert. dismissed, 543 U.S. 1132 (2005) 10, 27
Long v. *Eastfield Coll.*, 88 F.3d 300 (5th Cir. 1996) 33
Malley v. *Briggs*, 475 U.S. 335 (1969) 30
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 8
Meritor Sav. Bank, FSB v. *Vinson*, 477 U.S. 57 (1986) .. 17
Meyer v. *Holley*, 537 U.S. 280 (2003) 17
Mount Healthy City Sch. Dist. Bd. of Educ. v. *Doyle*, 429 U.S. 274 (1977) 31
New York Cent. & Hudson River R.R. v. *United States*, 212 U.S. 481 (1909) 17
Railroad Co. v. *Hanning*, 82 U.S. (15 Wall.) 649 (1873) 17

Cases—Continued: Page

Reeves v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) 27, 28
Shager v. *Upjohn*, 913 F.2d 398 (7th Cir. 1990) ... 18, 19, 33
Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 32
United States v. *Diebold*, 369 U.S. 654 (1962) 36

Constitution and statutes:

U.S. Const. Amend. I: 31
Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 31
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* ..... *passim*
42 U.S.C. 2000e(b) 12, 16, 24
42 U.S.C. 2000e-2(a) 2
42 U.S.C. 2000e-2(a)(1) 14, 16, 30
42 U.S.C. 2000e-2(m) 14, 30
Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 16
§ 102, 42 U.S.C. 1981a(b) 22

Miscellaneous:

Black's Law Dictionary (5th ed. 1979) 24
Fables of La Fontaine (Walter Thornbury trans., 1984) 19
Fleming James, Jr., *Vicarious Liability*, 28 Tul. L. Rev. 161 (1954) 21
Prosser and Keaton on the Law of Torts (W. Page Keeton ed., 5th ed. 1984) 22
1 Restatement (Second) of Agency (1957) 24

Miscellaneous—Continued: Page

Restatement (Third) of Agency (2006):

Vol. 1 24

Vol. 2 25

2 Restatement (Second) of Torts (1965) 30, 31

In the Supreme Court of the United States

No. 06-341

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 450 F.3d 476. The memorandum opinion and order of the district court (Pet. App. 32a-76a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2006. The petition for a writ of certiorari was filed on September 5, 2006. The petition for a writ of certiorari was granted on January 5, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

This case presents the question whether, or in what circumstances, an employer may be liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), for discrimination based on the alleged bias of a supervi-

sor, when the supervisor did not take the challenged employment action, but is alleged to have caused it. The court of appeals held that an employer may be vicariously liable in such circumstances where the supervisor's discriminatory actions cause the challenged adverse employment action. Pet. App. 21a. Applying that understanding, it reversed an order granting summary judgment for petitioner and dismissing the case, finding that the Equal Employment Opportunity Commission (EEOC) has produced sufficient evidence of discrimination to create a jury question. That judgment is correct and should be affirmed by this Court.

1. On December 30, 2002, the EEOC filed suit in federal district court against petitioner BCI Coca-Cola Bottling Company, alleging that petitioner discharged Stephen Peters because of his race, in violation of Title VII. J.A. 4-9. The EEOC subsequently explained that its primary theory of liability was that Peters' immediate supervisor, acting with a racially discriminatory motive, reported false information about Peters to the official responsible for discipline, and that the supervisor's racially biased report caused the official to order Peters' discharge. Pet. App. 2a, 9a. Petitioner moved for summary judgment, and the EEOC opposed that motion. *Id.* at 32a-33a. In support of their respective positions, the parties introduced the following evidence:

a. From May 1995 through October 2001, Peters, who is black, worked as a merchandiser for petitioner's Albuquerque, New Mexico facility. Pet. App. 2a. More than 60% of petitioner's Albuquerque employees were Hispanic, while fewer than 2% were black. *Ibid.* Merchandisers are hourly employees who place Coca-Cola products in retail outlets, such as grocery stores. *Ibid.* Merchandising is a physically demanding activity. J.A.

207-208. Merchandisers generally work five days per week, with two days off. Pet. App. 2a. Because grocery stores remain open seven days a week, merchandisers must occasionally work on their scheduled days off to cover shifts. *Ibid.* As the most senior merchandiser, Peters had both Saturdays and Sundays off. *Ibid.* In 2001, the same year in which the events at issue took place, petitioner awarded Peters a certificate for five years of "service, dedication, and commitment to the Company." *Id.* at 2a-3a.

Peters' day-to-day supervisor was Jeff Katt, who is white. Pet. App. 3a. Peters and Katt both reported directly to District Sales Manager Cesar Grado, who is Hispanic. *Ibid.* Grado was responsible for monitoring and evaluating employees under his supervision and had discretion to bring matters relating to their performance or discipline to the attention of petitioner's Human Resources Department. *Ibid.* Grado could not impose discipline himself; only a Human Resources official could. *Ibid.* Sherry Pedersen was the highest ranking human resources official in Albuquerque, and her supervisor was Pat Edgar, who worked in Phoenix. *Ibid.*

On Friday, September 28, 2001, Grado learned that he was short on merchandisers for Sunday, and asked Katt to tell Peters to work that day. Pet. App. 3a-4a. Peters told Katt that he could not work because he had plans. *Id.* at 4a. According to Grado, Katt also relayed to him that Peters had told Katt that he might call in sick. *Ibid.* Peters denied having said that to Katt, and Katt denied having said that to Grado. *Ibid.*

After speaking to Katt, Grado contacted Edgar and told her that he wanted Peters to work on Sunday and that he expected Peters to call in sick. Pet. App. 4a. Grado asked Edgar whether he could require Peters to

work on his day off. *Ibid.* Edgar responded that it was unacceptable for an employee to plan to call in sick two days in advance, and she told Grado to "find out what the situation was" and to order Peters to work on Sunday unless he could present a "compelling reason" for not working that day. *Ibid.* Edgar told Grado to characterize the instruction as a direct order and to warn Peters that failure to comply could subject him to termination for insubordination. *Ibid.*

When Grado spoke with Peters, he told him that he needed for him to work on Sunday. Pet. App. 5a; J.A. 33, 214-216. According to Grado, Peters responded that he had plans, and when Grado asked Peters what his plans were, Peters responded that his plans were "none of [Grado's] business." Pet. App. 5a. Grado also claimed that Peters began yelling. *Ibid*; J.A. 33, 92-93. Peters stated that when Grado told him to work on Sunday, he told Grado he had plans and had been feeling ill all week. Pet. App. 5a. Peters also stated that Grado never asked him what his plans were, or about not feeling well, and that he had remained calm throughout the conversation. *Ibid*; J.A. 70-71, 108. It is undisputed that Grado eventually told Peters that he was directing him to come to work and that his failure to do so could lead to his termination for insubordination, and that the conversation ended when Peters told Grado "[D]o what [you] got to do and I'll do what I got to do." Pet. App. 5a.

Grado then contacted Edgar and, according to him, told her "exactly what happened." Pet. App. 5a. Grado told Edgar that he had asked what Peters' plans were, but that Peters had told him that his plans were none of Grado's business, and that Grado should do what he needed to do. *Ibid.* According to Edgar, after Grado completed his report, she determined that Peters had

engaged in insubordination warranting termination. *Ibid.* Edgar claimed that she did not make a final decision because it was late on Friday. *Ibid.*

Because Peters felt ill on Saturday, he cancelled his weekend plans and went to the doctor. Pet. App. 5a. The doctor told Peters that he had a sinus infection, gave him a prescription, and told him not to work until Monday. *Id.* at 6a. After Peters returned home from the doctor's office, he telephoned Katt and told him that he was sick and that he would be unable to work on Sunday. *Ibid.* In seeking permission to miss work from Katt, rather than Grado, Peters followed standard company practice. *Id.* at 3a. Katt excused Peters from working on Sunday and then repeatedly paged Grado to let him know that Peters was sick and could not work on Sunday. *Id.* at 6a. Grado never returned Katt's pages. *Ibid.* Peters did not work on Sunday. *Ibid.*

On Monday, October 1, Grado and Pedersen spoke with Edgar by telephone several times. Pet. App. 6a. In those conversations, Grado told Edgar that Peters had not worked on Sunday and Pedersen told Edgar that Peters had been involved in an incident in 1999 for which he had received a two-day suspension for insubordination. *Ibid.* Edgar was not aware of the circumstances of the 1999 incident. *Id.* at 6a-7a. Those circumstances were that Peters' supervisor had ordered him to work on a day that Peters was to serve as the pallbearer at the funeral of his fiancee's son. *Id.* at 7a. Peters had raised the boy as his own son. *Ibid.* Peters' supervisor told him that the funeral was no excuse for refusing a direct order because he was not Peters' ~~biological~~ son. *Ibid.*

On Monday afternoon, Edgar instructed Grado and Pedersen to meet with Peters Tuesday morning and tell him that he was being terminated for insubordination.

J.A. 24, 46; Pet. App. 7a-8a. At around 5 p.m. on Monday, Grado told Peters to meet him at the plant the next morning at 8 a.m. J.A. 217-219.

Edgar later claimed that she based her decision primarily on Peters' conduct on Friday, rather than his failure to show up for work on Sunday, and that she also took into account the prior incident in 1999. Pet. App. 7a. Edgar also claimed that, prior to making her final decision, she had learned that Peters had been excused from working on Sunday. *Ibid.* According to Edgar, that circumstance did not affect her decision because she suspected that Peters was not really sick. *Ibid.*

Evidence indicated that Edgar did not know about Peters' excused absence before making her final termination decision. Pet. App. 7a-8a. In particular, Katt stated that he did not tell Grado about Peters' excused absence until Monday night, around 6 p.m. J.A. 252-255. That conversation occurred after Edgar had made her final decision and communicated it to Grado in the afternoon, J.A. 24, 46, and after Grado had communicated to Peters at 5 p.m. that he should meet him the following morning. J.A. 217-219.

The meeting the next morning was attended by Grado, Pedersen, Peters, and Grado's supervisor. Pet. App. 8a. At that meeting, Grado told Peters that he was terminated for insubordination for not showing up to work. *Ibid.* Grado handed Peters a termination document that stated that Peters had been given an order to report to work on Sunday, that he did not report on Sunday, and that he was therefore being terminated for insubordination. *Ibid.* Peters explained that he did not report to work because he was sick and that he had received permission from Katt to miss work that day. *Ibid.* After Peters spoke, the room grew quiet. *Id* at 8a-

9a. Peters then left the room. *Id.* at 9a. After the meeting, Pedersen allegedly called Edgar and asked her whether she knew that Peters was black. *Ibid.* Edgar allegedly did not know that Peters was black before then. *Ibid.*

b. The EEOC presented evidence from merchandisers who worked under Grado as well as evidence from Katt that Grado exhibited racial bias toward black employees. Michael Wilson, a black merchandiser, stated that Grado continually demeaned him and threatened to replace him, but treated Hispanic merchandisers with respect. Pet. App. 10a. Wilson also stated that Grado was "unusually picky" with black merchandisers, while Hispanic merchandisers "were not subject to th[e] same level of scrutiny." *Id.* at 25a. In addition, Wilson stated that Grado made race-based remarks to him during working hours. On one occasion, for example, Grado told him that "Black guys [do] not look good in trucks, they should drive Cadillacs." *Id.* at 10a. On another occasion, while Wilson was performing outdoor work, Grado told Wilson to hurry and finish because "brothers don't like the cold." *Ibid.*

James Young, another black merchandiser who worked under Grado, stated that Grado "nit-picked" his work and constantly threatened to change his days off and route, but did not treat non-black workers in the same manner. Pet. App. 24a-25a. Bryan Esquibel, an Hispanic who worked under Grado, stated that Grado treated black employees worse than other employees. *Id.* at 10a. Esquibel gave a number of examples of Hispanics who had engaged in insubordination, but who were not fired. *Id.* at 25a. Katt stated that he had a conversation with Grado after Peters' discharge and that, although he was not certain, Grado may have used

"the word 'nigger' or a comparable racial epithet to describe [Peters]." *Id.* at 10a-11a.

The EEOC also presented evidence that Grado did not report non-black employees for possible discipline in circumstances that paralleled those of Peters. A particularly striking example involved Grado's treatment of Monica Lovato. Grado directed Katt to order Lovato to work on one of her weekend days off. Pet. App. 11a. Lovato wanted to take both days off for her birthday, but Katt insisted that she work. *Ibid.* Lovato never showed up for work and did not call in or answer Katt's pages. *Ibid.* When Katt informed Grado that Lovato had disobeyed an order to work, Grado responded that "[y]ou can't make somebody work on one of their days off." *Ibid.* Lovato did not even receive a warning for her unexcused conduct. *Ibid.* The EEOC also introduced evidence that Grado ordered another Hispanic merchandiser, Arturo Lopez, to call him or risk termination for insubordination. J.A. 36, 267-268. Lopez did not comply, but Grado never reported Lopez's insubordination to the Human Resources Department. J.A. 36.

2. The district court granted petitioner's motion for summary judgment. Pet. App. 32a-76a. Applying the *McDonnell Douglas* burden-shifting framework, see *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-804 (1973), the district court held that the EEOC had established a prima facie case of discrimination, but that petitioner had produced evidence that its decision was based on Peters' alleged insubordinate conduct, rather than race, and that the EEOC had not produced sufficient evidence to create a material issue of fact on whether petitioner's asserted explanation was a pretext for discrimination. *Id.* at 52a-75a.

In reaching that conclusion, the district court rejected the EEOC's contention that petitioner could be held liable based on the evidence of Grado's racial bias. Pet. App. 65a-66a. The court held that an employer may be liable based on a subordinate's bias only when the actual decisionmaker relies on a subordinate's recommendation and does not conduct an independent investigation. *Id.* at 66a. That standard was not satisfied, the court concluded, because Grado did not recommend disciplinary action against Peters and because Edgar's discussion with Pedersen on Peters' disciplinary history constituted an independent investigation. *Id.* at 66a-67a.

3. The court of appeals reversed. Pet. App. 1a-31a. The court held that a subordinate official's bias can be imputed to an employer under common law agency principles when the subordinate official "accomplishes his discriminatory goals by misusing the authority granted to him by the employer—for example, the authority to monitor performance, report disciplinary infractions, and recommend employment actions." *Id.* at 16a-17a. The court explained that an employer's liability for a subordinate's misuse of such authority fits within the rule established in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), that an employer "may be vicariously liable for the actions of their employees—even intentional torts outside the scope of their employment—if the employee was aided in accomplishing the tort by the agency relation." Pet. App. 16a (internal quotation marks omitted).

The court of appeals concluded that holding an employer liable for a subordinate employee's discriminatory misuse of delegated authority also serves Title VII's objectives. Pet. App. 17a. The court explained that a biased subordinate who has no power to discipline

an employee can still "effectuate the termination of an employee from a protected class by recommending discharge or by selectively reporting or even fabricating information in communications with the formal decisionmaker." *Id.* at 18a. Applying common law agency principles, the court explained, gives employers an incentive to prevent such discrimination. *Ibid.*

As to "the level of control a biased subordinate must exert over the employment decision," Pet. App. 18a, the court of appeals held that Title VII incorporates common law causation principles and that the relevant inquiry is therefore "whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action." *Id.* at 20a-21a. The court held that, under those causation principles, an employer can avoid liability "by conducting an independent investigation of the allegations against an employee." *Id.* at 21a. The court reasoned that "[i]n that event, an employer has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated." *Ibid.*

The court rejected the rule, adopted by some circuits, that an employer is liable for subordinate bias whenever the subordinate has exerted *influence* that might have caused the challenged employment action. Pet. App. 19a. The court viewed that standard as inconsistent with common law causation principles. *Ibid.* The court also rejected the rule, adopted in *Hill* v. *Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc), cert. dismissed, 543 U.S. 1132 (2005), that an employer may be held liable for a subordinate's bias only when the subordinate is the "actual decisionmaker." Pet. App. 19a-20a. The court explained that Title VII refers to "agents" not "decisionmakers,"

and that the term "agent" includes not only decision-makers, but also persons whose actions are aided by the agency relation and cause injury. *Id.* at 20a. The court also concluded that the *Hill* standard would undermine Title VII's deterrent purposes because it would permit an employer to escape liability even when a subordinate's discrimination "is the sole cause of an adverse employment action." *Ibid.*

The court also rejected the district court's holding that an employer can be held liable for a subordinate's bias only when the subordinate makes a recommendation to terminate an employee. Pet. App. 21a-22a. That limitation, the court stated, "runs counter to the fairly broad 'aided by the agency relation' principle embodied in Title VII," and "would leave employees unprotected so long as a subordinate stops short of mouthing the words 'you should fire him.'" *Id.* at 22a.

Applying its agency and causation standards, the court held that the EEOC had introduced sufficient evidence to survive summary judgment on its claim that petitioner terminated Peters because of his race. Pet. App. 22a-31a. The court determined that the EEOC had introduced sufficient evidence that Grado was animated by racial bias, *id.* at 23a-26a; that Grado used the authority delegated by petitioner to gather the facts and present them to Edgar, *id.* at 28a; that Edgar relied exclusively on Grado's report in making her decision to terminate Peters, *ibid.*; and that Grado's report caused the termination. *Id.* at 28a-29a. The court concluded that because the jury could infer that Grado's report was tainted by race discrimination, "it could also find that the proffered reason for firing Mr. Peters, which rests entirely on that report, is pretextual." *Id.* at 29a.

The court of appeals rejected petitioner's claim that Edgar had conducted an independent investigation that broke the chain of causation that flowed from Grado's biased report. Pet. App. 30a-31a. The court concluded that the investigation was inadequate because it consisted solely of Pedersen pulling Peters' file and that file did not contain any information about the recent incident involving Grado. *Id.* at 30a. As to that incident, the court concluded, Edgar had relied entirely on Grado's report, permitting the jury to conclude that Grado's report had caused the termination. *Id.* at 31a.

SUMMARY OF ARGUMENT

An employer is liable under Title VII when a supervisor exercises delegated authority in a discriminatory manner and thereby causes a tangible employment action, such as a discharge. Applying that standard, which incorporates standard agency and causation principles, the court of appeals properly concluded that the record does not support the grant of summary judgment for petitioner and that, instead, further proceedings are necessary to dispose of the EEOC's Title VII claim.

A. Title VII expressly incorporates agency principles in defining the scope of an employer's liability. See 42 U.S.C. 2000e(b). Under settled agency principles, an employer is vicariously liable for the acts of its employees (*i.e.*, its agents) in the scope of employment. When an employer delegates authority to a supervisor to engage in customary employment responsibilities—*e.g.*, to monitor employees and report on their performance—a supervisor's exercise of such authority falls within the scope of his employment. If such authority is exercised in a discriminatory manner and causes a tangible em-

ployment action, the employer is liable for its employee's misconduct under settled agency principles.

That conclusion squares with the "aided by the agency relation" principle applied in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998). A supervisor who exercises delegated authority to cause a tangible employment action is aided in accomplishing a tort by the existence of the agency relation with his employer. In addition, this approach furthers the objectives of Title VII, including to avoid harm by creating an incentive for employers to ensure that their agents do not engage in wrongdoing and to compensate the victims of discrimination. At the same time, under this inquiry, an employer is not vicariously liable for the acts of individuals who are not employees, or for the acts of employees who are not exercising delegated authority.

B. Petitioner's rule, which would limit an employer's liability to the discriminatory acts of "actual decisonmakers," has no footing in the text of Title VII. It conflicts with the settled agency principles that Congress expressly incorporated when it enacted Title VII. It contravenes the rule that this Court adopted in *Ellerth* and *Faragher* that an employer is vicariously liable —under the "aided by the agency relation" test—for a supervisor's misuse of authority that results in a tangible employment action. And it frustrates the objectives of Title VII by cabining the statute's reach and permitting employer-authorized, discriminatory misconduct to go unremedied. Similarly, while an employer's negligence provides an alternative basis for imposing liability, an employer's liability in this context is not limited to a showing of negligence.

C. To establish a Title VII violation, a plaintiff must also show that the supervisor's discriminatory misuse of delegated authority *caused* the challenged employment practice. See 42 U.S.C. 2000e-2(m), 2000e-2(a)(1). To prove causation, a plaintiff must show both that the challenged employment action would not have occurred in the absence of the supervisor's misconduct (*i.e.*, "but-for" cause), and that the supervisor's misconduct was a substantial factor in producing the challenged harm (*i.e.*, proximate cause). That standard is grounded in traditional tort principles, which are incorporated by the law of agency. It also squares with this Court's decisions, which have incorporated but-for and proximate causation requirements in various contexts.

An employer's independent investigation into the events underlying a tangible employment action may break the chain of causation. The chain will be broken where, as a result of an employer's independent investigation, the supervisor's misconduct is no longer a substantial factor resulting in the challenged employment action—*e.g.*, where a supervisor's allegedly discriminatory version of events is confirmed by other witnesses who lack any discriminatory motive. The causation standard thus gives employers an incentive to conduct truly independent and meaningful investigations into tangible employment actions to uncover any discriminatory conduct of biased supervisors, even though employers are not required to conduct such investigations.

D. Applying these principles, the evidence at this stage of the case precludes the grant of summary judgment for petitioner. It is undisputed that the supervisor (Grado) exercised delegated authority—including the authority to assign work, monitor employees, gather facts, and report disciplinary infractions—in connection

with the events that led to Peters' discharge. Likewise, there is ample evidence that Grado exercised that authority as to Peters with a discriminatory motive, including evidence that Grado made race-based comments in the workplace, treated black employees worse than employees of other races, and failed to report similar disciplinary infractions by employees of other races.

The evidence also supports a finding that Grado's actions caused Peters' discharge. The matter was reported only as a result of Grado's actions. In addition, the ultimate decision-maker (Edgar) relied almost entirely on Grado's biased report in discharging Peters. Edgar's review of Peters' personnel file does not break the chain of causation, because that file contained no information on the incident at issue. Edgar undertook no meaningful "independent investigation" of the incident at issue and, indeed, did not even ask Peters for his side of the story.

Whatever conclusion a reasonable juror might reach on the facts of this case, there is ample evidence to preclude summary judgment for petitioner at this stage under a proper application of Title VII. The judgment of the court of appeals should therefore be affirmed.

ARGUMENT

AN EMPLOYER IS LIABLE UNDER TITLE VII WHEN A SUPERVISOR ACTING WITH A DISCRIMINATORY MOTIVE USES DELEGATED AUTHORITY TO CAUSE A TANGIBLE EMPLOYMENT ACTION SUCH AS A DISCHARGE

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, makes it "an unlawful employment practice for an employer * * * to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

terms, conditions, or privileges of employment because of such individual's race." 42 U.S.C. 2000e-2(a)(1). The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, specifies that "an unlawful employment practice is established when the complaining party demonstrates that race * * * was a motivating factor for any employment practice." 42 U.S.C. 2000e-2(m). Under that statutory text, proof that a supervisor acted with a discriminatory motive is not sufficient to establish a violation. Rather, the supervisor's discriminatory motive must be attributable to the "employer," and it must be causally linked to the challenged "employment practice." Those prerequisites are met when a supervisor acting with a racially discriminatory motive uses authority delegated from the employer, such as authority to report a disciplinary infraction, and causes a tangible employment action, such as a discharge.

A. Under Agency Principles, An Employer Is Vicariously Liable When A Discriminatorily Motivated Supervisor Uses Delegated Authority To Cause A Tangible Employment Action

Title VII expressly defines "employer" to include "any agent" of an employer. 42 U.S.C. 2000e(b). By defining "employer" to include "any agent," Congress directed "that courts look to traditional principles of the law of agency in devising standards of employer liability in those instances where liability for the actions of a supervisory employee were not otherwise obvious." *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 791-792 (1998); see *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 754 (1998) ("In express terms Congress has directed federal courts to interpret Title VII based on

agency principles.") (citing Section 2000e-(b)); *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 72 (1986).

1. Under long established agency principles, "principals or employers" are "vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003). That principle applies to "both negligent and intentional torts committed by an employee within the scope of his or her employment." *Ellerth*, 524 U.S. at 756. It also applies regardless of whether the employer authorized or knew about the acts of the agent. *Railroad Co.* v. *Hanning*, 82 U.S. (15 Wall.) 649, 657 (1873). Employees act within the scope of their employment when they are "exercising the authority delegated to [them.]" *New York Cent. & Hudson River R.R.* v. *United States*, 212 U.S. 481, 494 (1909).

Consistent with those established principles, when an employer delegates authority to a supervisor to engage in customary employment responsibilities—*e.g.*, to assign work, monitor an employee's performance, decide whether to report a matter for discipline, gather the facts relating to that matter, or make a recommendation on what action should be taken—a supervisor's exercise of that authority falls within the scope of the supervisor's employment. Accordingly, when delegated authority is exercised in a discriminatory manner and causes a tangible employment action, the employer is vicariously liable under agency principles and Title VII.

That conclusion squares with the Court's holding in *Ellerth* that "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment," and that employer liability for supervisory harassment must therefore be based on other agency principles. 524 U.S. at 757. No employer dele-

gates authority to supervisors to make sexual advances to those under their supervision. Such conduct is therefore generally outside the scope of employment and must be analyzed under other agency principles. In contrast, employers customarily do delegate authority to supervisors to assign work, monitor an employee's performance, refer matters for discipline, investigate the underlying facts, and make recommendations on what should be done. When supervisors exercise such authority, they therefore act within the scope of employment.

The Seventh Circuit reached that conclusion in *Shager* v. *Upjohn*, 913 F.2d 398 (1990) (Posner, J.). In that case, the court held that when employees make sexual advances to other employees, they do not act within the scope of employment. *Id.* at 405. In contrast, the court observed that a supervisor who fires an employee acts within the scope of employment and renders the employer vicariously liable, even when the supervisor does so based on a discriminatory motive. *Ibid.* The court explained that "a supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer." *Ibid.* The court added that "[f]rom the outside, at least, it looks as if he is doing his job, which is not the case when one worker sexually harasses another." *Ibid.*

The court in *Shager* then held that the same principle of vicarious liability also applies when a discriminatory supervisor does not make the ultimate decision to fire the employee, but instead misuses delegated authority to evaluate and make recommendations concerning subordinates to procure an employee's discharge. 913 F.2d at 405. The court explained that such a supervisor

would be "acting within (even if at the same time abusing) his authority," rendering the employer vicariously liable. *Ibid.* The fact that the actual decision to fire the employee is made by someone else does not automatically excuse the employer from liability. If the actual decisionmaker (in *Shager*, a "Career Path Committee") "acted as the conduit of [the supervisor's] prejudice—his cat's-paw—the innocence of [the decisionmaker] would not spare the company from liability." *Ibid.*

This theory of liability has been referred to as the "cat's paw doctrine," taking its name from the La Fontaine fable in which "a monkey convinces an unwitting cat to pull chestnuts from a hot fire." Pet. App. 14a (citing *Fables of La Fontaine* 344 (Walter Thornbury trans., 1984)). As the court of appeals explained, "[i]n the employment discrimination context, 'cat's paw' refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Id.* at 14a-15a.[1]

---

[1] While some courts and the Restatement (Second) of Agency have expressed the view that an agent acts within the scope of employment only when motivated at least in part by an intent to serve the employer, other courts have expressed the view that an agent can act within the scope of employment, regardless of whether the agent's motive is to serve the employer. See *Faragher*, 524 U.S. at 793-796. In the context of a supervisor who has exercised delegated authority with a discriminatory motive and caused a tangible employment action, the conclusion whether the supervisor was acting within the scope of employment should not depend on a factbound inquiry into subjective intent, *i.e.*, whether the supervisor acted in part out of a misguided belief that either the discrimination or the underlying employment action would also benefit the employer. It is difficult enough to determine whether a supervisor has acted with a discriminatory motive, without adding a second, and even more difficult, inquiry into whether the supervisor was

2. A supervisor who exercises delegated authority to cause a tangible employment action is also "aided by the agency relation," under the agency principles adopted by the Court in *Ellerth* and *Faragher*. Under those decisions, an employer can be vicariously liable for a supervisor's conduct when the supervisor is aided in accomplishing a tort by the existence of the agency relation. *Ellerth*, 524 U.S. at 760-765; *Faragher*, 524 U.S. at 801-808. To impose vicarious liability under the "aided in the agency relation principle," it is not enough to show that the supervisor's agency relation provides "[p]roximity and regular contact" with "a captive pool of potential victims." *Ellerth*, 524 U.S. at 760. Rather, as explained above, for vicarious liability to attach, there must be "something more than the employment relation itself." *Ibid.*; see *Faragher*, 524 U.S. at 802.

In *Ellerth*, the Court identified "a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of [the unlawful employment practice]: when a supervisor takes a tangible employment action against the subordinate." 524 U.S. at 760. A tangible employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different job responsibilities or a decision causing a significant change in benefits." *Id.* at 761.

---

motivated in part by a belief that discrimination would benefit the employer. However necessary such an inquiry may be to the scope of employment inquiry when a supervisor is engaged in actions, such as making sexual advances, that form no part of a supervisor's delegated authority, such an inquiry is unnecessary in the present context, where the supervisor is exercising delegated authority to undertake customary employment tasks—*e.g.*, to report an employer for a disciplinary infraction—albeit with an improper discriminatory animus.

When a supervisor takes a tangible employment action, "there is assurance the injury could not have been inflicted absent the agency relation." *Id.* at 761-762. Accordingly, the requirements of the "aided in the agency relation" principle of vicarious liability "will always be met when a supervisor takes a tangible employment action against a subordinate." *Id.* at 762-763.

Under *Ellerth* and *Faragher*, that principle of vicarious liability is not limited to supervisors who make the ultimate employment decision that has tangible adverse consequences. Instead, it logically applies whenever a supervisor's "discriminatory act" of a type that a supervisor is empowered to perform because of his supervisory capacity "*results in* a tangible employment action." *Ellerth*, 524 U.S. at 760 (emphasis added). Accordingly, as the court of appeals correctly concluded (Pet. App. 16a-17a), when supervisors, acting with a discriminatory intent, use their delegated authority to monitor performance, report disciplinary infractions, and recommend employment action to effect a tangible employment action, such as a discharge, an employer is vicariously liable under the "aided by the agency relation" principle applied in *Ellerth* and *Faragher*.

3. In construing Title VII, this Court "adapt[s] agency concepts to the practical objectives of Title VII." *Faragher*, 524 U.S. at 802 n.3. Subjecting an employer to vicarious liability for a supervisor's misuse of delegated authority that causes a tangible employment action, such as a discharge, furthers Title VII's objectives.

One of the principal justifications for the common law rule imposing vicarious liability on agents who abuse their authority and cause harm is that it creates an incentive for employers to intensify their efforts to prevent their agents from causing harm. Fleming James,

Jr., *Vicarious Liability*, 28 Tul. L. Rev. 161, 168 (1954). That principle applies with particular force to supervisors like Grado. The other major reason the common law holds an employer vicariously liable for the acts of its agents who abuse their authority and cause harm is to ensure that the victims of wrongful conduct are compensated. *Id.* at 169-170; *Prosser and Keaton on the Law of Torts* 500-501 (W. Page Keeton ed., 5th ed. 1984). The common law approach rests on the view that, because the employer has sought to profit through its agents, the employer, rather than the innocent victim, should bear the costs when those agents abuse their delegated authority and cause injury to others. *Ibid.*

Title VII's objectives parallel those that support the common law rule imposing vicarious liability for an agent's abuse of delegated authority. Like the common law rule of vicarious liability, one major purpose of Title VII is to provide a "spur" or a "catalyst" for an employer to intensify its efforts to eliminate discrimination from the workplace. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975) (citation omitted). It is especially important to do so from the ranks of supervisors. Similarly, like the common law rule of vicarious liability, another major purpose of Title VII is to compensate victims of discrimination. *Id.* at 418. Congress underscored that purpose when it enacted the Civil Rights Act of 1991, which authorizes compensatory damages for intentional violations of Title VII, 42 U.S.C. 1981a(b).

4. The agency principles discussed above apply when an improperly motivated supervisor exercises delegated authority to cause a tangible employment action. An employer would not be vicariously liable, for example, if a customer, or an independent contractor, acting with a discriminatory motive, falsely reported that an em-

ployee engaged in misconduct and that report caused the employee to be discharged. Nor would an employer be vicariously liable if an ordinary employee acting with a discriminatory motive falsely reported another employee's misconduct, and that report caused the employee's discharge. Even a supervisor's racially motivated false report would not subject an employer to vicarious liability if making the report was not part of the supervisor's delegated job responsibilities.

Those limitations cabin the principle of vicarious liability. Employers have "a greater opportunity to guard against misconduct" by supervisors who exercise delegated authority and cause a tangible employment action, than by "common workers" or supervisors who are not delegated that kind of authority. See *Faragher*, 524 U.S. at 803. Employers "have greater opportunity and incentive to screen them, train them, and monitor their performance." *Ibid.* Holding employers vicariously liable when supervisors do engage in discriminatory misconduct gives effect to Title VII, while recognizing that Congress was sensitive to the burdens that employers face. See *Faragher*, 524 U.S. at 786-787. Indeed, the Chamber of Commerce—the largest federation of business, trade, and professional organizations in the United States—has taken the position (Amicus Br. 18) that an employer is vicariously liable for a supervisor's improperly motivated action that causes another official to take a tangible employment action where the supervisor's improperly motivated action "involves an exercise of delegated authority."

B. Petitioner's Effort To Limit Employer Liability To The Acts Of "Actual Decisionmakers" And To Employer Negligence Is Inconsistent With Agency Principles

1. Petitioner argues (Br. 19) that under agency principles, an employer is vicariously liable for the acts of someone who is not the "formal decisionmaker," only if that person is "principally responsible for the decision or is, in effect the actual decisionmaker behind the adverse employment action." For numerous reasons, that proposed standard should be rejected.

a. Petitioner's "actual decisionmaker" standard conflicts with the text of Title VII. The term "actual decisionmaker" does not appear in Title VII. Instead, Title VII defines an employer to include "*any* agent," 42 U.S.C. 2000e(b) (emphasis added). Congress's use of the broad common law term "agent" accompanied by the all-encompassing modifier "any" underscores that Congress did not intend to limit an employer's liability to the acts of "actual decisionmakers." See *Black's Law Dictionary* 59 (5th ed. 1979) ("agent" includes "[a] person authorized by another to act for him").

b. Petitioner's actual decisionmaker standard also conflicts with the rule that employers are vicariously liable for the acts of all employees who act within the scope of employment, not just actual decisionmakers. Petitioner cites (Br. 21) the scope of employment standards articulated in 1 Restatement (Third) of Agency § 2.04, at 139 (2006); *Ellerth*, 524 U.S. at 755-756; and 1 Restatement (Second) of Agency § 219(1), at 481 (1957). All three of those sources, however, refer to *all* employees who act within the scope of employment, not just "actual decisionmakers." *Ibid.* Accordingly, if, as petitioner concedes (Br. 21-22), the scope of employment

principle makes an employer liable when an "actual decisionmaker" acts with a discriminatory motive to effect a tangible employment action, it similarly makes an employer vicariously liable when supervisors who are not actual decisonmakers misuse their delegated authority to cause a tangible employment action. Like actual decisionmakers, such supervisors act within the scope of their employment, rendering the employer vicariously liable for their discriminatory conduct.

c. Petitioner's actual decisionmaker standard also cannot be reconciled with the rule adopted in *Ellerth* and *Faragher*. As previously discussed, the "aided by the agency relation" principle is not limited to actual decisionmakers, but logically applies whenever a discriminatorily motivated supervisor uses delegated authority to cause a tangible employment action. Petitioner argues (Pet. 41) that the "aided by the agency relation" principle is simply a refinement of apparent authority, and therefore applies only when an agent's fraud or deceit causes the plaintiff to believe that the agent has apparent authority. In *Faragher*, however, this Court squarely rejected the same proposed limitation as "untenable," holding that the aided-by-the-agency-relation principle instead applies when "tortious conduct is made possible or facilitated by the existence of the actual agency relationship." 524 U.S. at 801-802.

Petitioner also seeks to rely on the *Restatement (Third) of Agency*'s failure to include aided by the agency relation as a distinct ground of vicarious liability. But the commentary to the relevant section of that restatement explains that the section "is inapplicable to an employer's liability for one employee's tortious conduct toward a fellow employee, a topic being considered by Restatement Third, Employment Law," which the

American Law Institute has not yet published. 2 Restatement (Third) of Agency § 7.07, cmt. a at 199 (2006). Because the question presented here concerns the employer's vicarious liability for the conduct of one employee toward a fellow employee, the *Restatement (Third) of Agency* is "inapplicable."

In any event, Congress enacted Title VII against the backdrop of traditional common law agency principles that included aided by the agency relation as a distinct ground of vicarious liability. The *Restatement (Third) of Agency*—which was formulated after Congress passed Title VII—cannot alter the scope of Title VII, or the backdrop against which it was enacted. Nor could it override this Court's holdings in *Ellerth* and *Faragher* that Title VII imposes vicarious liability under the "aided by the agency relation" principle when a supervisor acting with a discriminatory intent uses delegated authority to cause a tangible employment action.

d. Petitioner's actual decisionmaker standard is also inconsistent with the objectives of Title VII. Under petitioner's theory, even when a supervisor's discrimination is the cause of an adverse employment action, an employer would escape liability unless the supervisor was the "actual decisionmaker." For example, as the court of appeals in this case explained, "[a] biased low-level supervisor with no disciplinary authority might effectuate the termination of an employee from a protected class by recommending discharge or by selectively reporting or even fabricating information in communications with the formal decisionmaker." Pet. App. 18a. Under petitioner's standard, unless such a supervisor was the "actual decisionmaker," Title VII would afford no protection against such discriminatory conduct. That consequence cannot be squared with Title VII's goal of

preventing job opportunities from being allocated based on impermissible criteria, such as race or gender.

e. Petitioner's reliance (Br. 14, 23) on the Fourth Circuit's decision in *Hill* v. *Lockheed Martin Logistics Management., Inc.*, 354 F.3d 277 (2004) (en banc), cert. dismissed, 543 U.S. 1132 (2005), is misplaced. As explained in the EEOC's brief in opposition to certiorari (p. 12), *Hill* remains an outlier in the circuits on the question presented. Moreover, as the quotation in the footnote below indicates, it is not entirely clear that *Hill*'s "actual decisionmaker" would apply in a case like this in which a *supervisor* has used delegated authority to cause a tangible employment action.[2]

More fundamentally, *Hill* misconstrued this Court's isolated use of the phrase "actual decisionmaker" in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In *Reeves*, the Court held that, in determining whether a defendant is entitled to judgment as a matter of law, a court should review all of the evidence in the record, drawing all reasonable inferences in favor of the nonmoving party. *Id.* at 150. "Applying th[at]

---

[2] The pertinent passage from *Hill* states:

> [W]e decline to endorse a construction of the discrimination statutes that would allow a biased subordinate who has *no supervisory* or disciplinary authority and who does not make the final or formal employment decision to become a decisionmaker simply because he had a substantial influence on the ultimate decision. * * * [A]n aggrieved employee who rests a discrimination claim under Title VII or the ADEA upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer.

354 F. 3d at 291 (emphasis added).

standard," the Court held that judgment as a matter of law was not warranted on the facts of that case in part because the employee had introduced evidence that would permit a jury to conclude that a biased manager who recommended plaintiff's discharge was the "actual decisionmaker." *Id.* at 151-152.

The *Reeves* Court did not suggest that such a factual inference was a necessary element of employer liability as a matter of law. Instead, as the court of appeals below explained (Pet. App. 20a), by using the phrase "actual decisionmaker," the Court in *Reeves* "was describing what the petitioner's evidence showed, not prescribing the 'outer contours' of liability." Indeed, no agency law question was presented in the case and the phrase "actual decisionmaker" appears in a single sentence describing the evidence in the case in a part of the opinion that did not contain any discussion of agency principles.

2. Petitioner alternatively argues (Br. 28-29) that liability can be established only if the plaintiff can show that the employer was negligent. In particular, petitioner argues (*ibid.*) that a plaintiff must show that the employer knew or should have known of the employee's bias or discriminatory conduct. That is incorrect.

A plaintiff is free to seek to establish an employer's liability by showing that the employer was negligent. *Ellerth*, 524 U.S. at 759. But as *Ellerth* makes clear, employer negligence is a "minimum standard," not a maximum one, and a showing of negligence is not necessary when a plaintiff can satisfy "the more stringent standard of vicarious liability." *Ibid.* As discussed above, vicarious liability is warranted under agency principles when a supervisor acting with a discriminatory intent uses delegated authority to cause a tangible employment action. When such a showing can be made,

there is no need for a plaintiff to make an additional showing that the employer was negligent in failing to take steps to prevent the supervisor's biased actions.

Petitioner seeks to justify its negligence rule based on the notion that such a rule furthers Title VII's deterrent purposes. Br. 30. But as discussed, the common law has imposed vicarious liability on an employer for an agent's misuse of delegated authority because vicarious liability is thought to be more effective in promoting employer efforts to prevent agents from causing harm than a rule that would hinge liability on a difficult case-specific showing that the employer was negligent in supervising or training its agents. Moreover, Title VII's goal of compensating victims would be frustrated by requiring a plaintiff to establish that an employer is negligent in failing to prevent discrimination for which the employer is vicariously liable under agency law.[3]

C. Causation Is Established When A Supervisor's Discriminatorily Motivated Misuse Of Delegated Authority Is A Substantial Factor In Bringing About A Tangible Employment Action

1. To establish a violation of Title VII in this context, a plaintiff must not only show that a prohibited characteristic, such as race, was a motivating factor for a supervisor's conduct, and that the supervisor's discriminatory conduct can be imputed to the employer. A plaintiff

---

[3] Because the EEOC sought to impose liability on petitioner based on principles of vicarious liability and not negligence, it did not conduct a full-scale investigation into petitioner's claims about the quality of its training and monitoring program. For that reason, petitioner's untested statements about its efforts to ensure nondiscrimination are beside the point. Indeed, even the limited record available on that issue casts doubt on petitioner's claim. J.A. 106, 194, 197 (statements by employees that they did not recall receiving training).

must also show that the supervisor's discriminatory conduct *caused* the challenged employment practice. Such a showing of causation is necessary to prove that the prohibited characteristic was a motivating factor "*for*" the "employment practice," 42 U.S.C. 2000e-2(m) (emphasis added), and that the employment practice occurred "*because of*" the prohibited characteristic. 42 U.S.C. 2000e-2(a)(1) (emphasis added). It is also necessary to satisfy settled agency principles, under which an employer is vicariously liable only "for harm *caused by* misuse of supervisory authority." *Ellerth*, 524 U.S. at 764 (emphasis added); *Faragher*, 524 U.S. at 807.[4]

2. As the court of appeals concluded, the *Restatement (Second) of Agency* incorporates "standard tort concepts like causation." Pet. App. 21a. Cf. *Malley* v. *Briggs*, 475 U.S. 335, 344-345 n.7 (1996) (concluding that "§ 1983 should be read against the background of tort liability," including causation principles) (internal quotation marks and citation omitted). Under the common law of torts, in order to establish causation, a plaintiff must prove that an actor's conduct "is a substantial factor in bringing about the harm." 2 Restatement (Second) of Torts § 431(a) at 428 (1965). That standard has two dimensions. First, the evidence must create an inference that the harm would not have occurred in the absence of the actor's conduct. *Id.* § 431 cmt. a at 429. That showing is commonly referred to as "but-for causa-

---

[4] This causation standard is distinct from the requirement that race need only be a motivating factor in the decision as discussed in *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90 (2003). If a supervisor had a mixed motive for his actions, but race was a motivating factor, that is enough. In addition, however, the supervisor's actions—be it issuing a report or conducting a review—must cause the ultimate employment action challenged in the lawsuit.

tion." Second, the effect of the actor's conduct must not be so insignificant as to make it unreasonable to treat the actor as responsible for the harm. *Ibid.* The effect of the actor's conduct must be "substantial," rather than "negligible" in producing the harm. *Id.* § 431 cmt. b at 429. That showing is commonly referred to as "proximate causation." Thus, both but-for and proximate cause are required to establish causation.

3. This Court has previously applied basic causation principles in the Title VII context. See, *e.g.*, *Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 272-273 (2001) (per curiam) (considering "causal connection" between employee's protected activity and adverse employment action). In addition, the Court has invoked the common law's but-for and proximate causation requirements in other analogous contexts. For example, in interpreting the "because of" requirement in the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, the Court has held that a plaintiff must prove that age "played a role in th[e] process and had a *determinative influence* on the outcome." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993) (emphasis added).

Similarly in *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977), the Court held that a plaintiff raising a First Amendment retaliation claim in the employment context must show that conduct protected by the First Amendment was a "substantial factor" in an adverse employment decision. The public employer may then avoid liability by showing that the same decision would have been made in any event. *Ibid.* The Court has explained that a "substantial factor" is one that creates an inference of but-for causation. *Hartman* v. *Moore*, 126 S. Ct. 1695, 1703-1704 (2006).

The Court has also incorporated the concept of proximate causation in various contexts. For example, in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), the Court examined the question of the appropriate causation standard for cases in which harm is arguably caused by two actors, one of whom is alleged to have influenced the other. *Id.* at 701-703. In that context, the Court held that "[i]t is necessary * * * to conclude that the act or omission [of the initial actor] was sufficiently close to the ultimate injury, and sufficiently important in producing it, to make it reasonable to follow liability back [to the initial actor]." *Id.* at 703. See also *Anza* v. *Steel Supply Corp.*, 126 S. Ct. 1991, 1997 (2006) (looking to concept of "proximate-cause" in analyzing RICO claim).

4. The common law and the Court's analysis of causation in analogous contexts properly inform Title VII's causation requirement. Accordingly, to establish a Title VII violation, a plaintiff must show that a supervisor's discriminatorily motivated use of delegated authority was a substantial factor in bringing about a tangible employment decision by another actor. That means it must play a sufficient role to give rise to an inference of but-for causation, and that its effect on the decision must be sufficiently substantial to make it reasonable to regard it as a proximate cause of that decision. The causation standard of tort provides a well-known and workable standard for determining when an employer may be vicariously liable for the acts of supervisory employees. In addition, the standard advances the objectives of Title VII by establishing liability when the biased act of a supervisor results in an adverse employment action, but also will help weed out insubstantial claims.

D. An Employer's Independent Investigation Can Break The Chain Of Causation

As a significant number of courts of appeals have recognized, even when a supervisor acting with a discriminatory motive has used delegated authority in an attempt to bring about a tangible employment action, the employer may be relieved from liability if it conducts a subsequent investigation that breaks the causal chain between the supervisor's misconduct and the tangible employment action. See, *e.g.*, Pet. App. 16a; *Long* v. *Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996); *Shager*, 913 F.2d at 405. The conclusion that a subsequent investigation is capable of breaking the causal chain between a supervisor's misconduct and a tangible employment action follows from the causation standard discussion above. Under that standard, the chain of causation will be broken by a subsequent investigation when, as a result of the investigation, the supervisor's discriminatory misuse of authority can no longer be regarded as a "substantial factor" in the tangible employment action. The causation standard thus creates an incentive for employers to adopt policies encouraging such investigations in appropriate circumstances.[5]

For example, suppose a supervisor's alleged discriminatory action was his misuse of delegated authority to provide inaccurate information to the ultimate decisionmaker, and a subsequent investigation uncovered independent and accurate information supporting the employment action at issue. If the ultimate decisionmaker

---

[5] Of course, an employer might also opt to devote the time and resources to selecting supervisors who are unlikely to engage in discriminatory conduct and training those supervisors to prevent discrimination in the workplace.

then based her decision to discharge the employee on the independent sources, the investigation would break the causal connection between the supervisor's alleged discriminatory conduct and the tangible action. The supervisor's allegedly false information could still be viewed as a but-for cause of the tangible employment action in the sense that it triggered the independent investigation. But, if the ultimate decisionmaker based her decision on the independent sources, then the allegedly biased report of the supervisor would not be a "substantial factor" in bringing about the tangible employment action.

In contrast, suppose the subsequent investigation consisted of nothing more than asking the supervisor for a fuller account, and the supervisor's account remained deliberately slanted for discriminatory reasons. In that event, if the ultimate decisionmaker then relied on the supervisor's deliberately slanted account to take a tangible employment action, the investigation would not break the causal chain. The supervisor's biased report would be a substantial factor in bringing about the tangible employment action, and principles of vicarious liability would subject the employer to liability for the supervisor's discriminatorily motivated misuse of delegated authority. An independent assessment of the facts cannot overcome the fact that a biased supervisor deliberately slanted the facts presented to the ultimate decisionmaker, and the ultimate decisionmaker relied exclusively on that information to take a tangible employment action.

In other cases, it may be more difficult to determine whether a subsequent investigation has broken the chain. But the ultimate inquiry is always the same: whether, in light of the investigation, the supervisor's

discriminatory use of delegated authority was a substantial factor leading to the tangible employment action. In assessing the investigation, the question is not whether the ultimate decisionmaker was negligent in failing to conduct an investigation or in structuring the investigation in a particular way. An employer has no obligation to conduct an investigation. Rather, when an employer chooses to conduct a subsequent investigation (or put in place a policy calling for such investigations), the investigation is relevant to the extent that it sheds light on the question whether the supervisor's discriminatory misuse of delegated authority was a substantial factor in bringing about a tangible employment action.

The more thorough, balanced, and truly independent the investigation, the more likely the termination will be the result of the investigation rather than the discriminatory input. As discussed below, in this case there was no independent investigation worthy of the name. Indeed, the employer failed even to take the simple step of asking the discharged employee for his side of the story. This case therefore presents a clear situation where the chain of causation remains intact.

E. Because A Reasonable Factfinder Could Conclude That Petitioner Discharged Peters Because Of His Race, Petitioner Was Not Entitled To Summary Judgment

1. Under the principles discussed above, the EEOC is required to make three showings to support its claim that petitioner unlawfully discharged Peters because of his race. First, the EEOC must prove that race was a motivating factor in Grado's actions. Second, the EEOC must prove that Grado was exercising delegated authority in connection with those actions. And third, the EEOC must prove that Grado's racially motivated con-

duct caused Peters' discharge, in that the discharge would not have occurred but for the conduct and that the conduct was a substantial factor in the discharge.

Because this case arises on petitioner's motion for summary judgment, the relevant question is whether, when the evidence is viewed in the light most favorable to the EEOC, a reasonable factfinder could make each of those three findings, or whether there are material issues of disputed facts as to those elements. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986); *United States* v. *Diebold*, 369 U.S. 654, 655 (1962) (per curiam). As the court of appeals correctly concluded, Pet. App. 22a-31a, a reasonable factfinder could rule in the EEOC's favor on each of those three elements. Accordingly, petitioner is not entitled to summary judgment on the evidentiary record before the Court.

a. First, there was abundant evidence from which a reasonable factfinder could find that race was a motivating factor in Grado's conduct. In particular, the EEOC introduced evidence—including the affidavits of other employees—that Grado made numerous race-based comments in the workplace and "may have used the word 'nigger' or a comparable racial epithet to describe [Peters]," Pet. App. 10a-11a; that he treated black employees worse than the employees of other races and "nit-pick[ed]" the work of black employees; and that, while he reported Peters for allegedly refusing to comply with an order to work on his day off, he was "unfazed" when an Hispanic employee (Lovato) ignored an order to work on her day off and, instead of calling for discipline, reportedly said 'You can't make somebody work one of their days off.'" *Id.* at 23a-26a.

b. Second, there is abundant evidence that Grado was exercising delegated authority in connection with

the events that led to Peters' discharge. Grado was delegated authority to assign work, to monitor and evaluate employees under his supervision, and to decide when to refer a disciplinary infraction to petitioner's Human Resources Department. Pet. App. 3a. Grado was also delegated authority to gather the facts bearing on an infraction of work rules and present them to a human resources official for a disciplinary decision. J.A. 91.

Every action that Grado took in connection with the events that culminated in Peters' discharge was an exercise of delegated authority, from his decision to assign Peters to work on his day off (Pet. App. 3a-4a); to his decision to ask Edgar if he could order Peters to work on his day off (*id.* at 4a); to his decision to report Peters for allegedly refusing to work on his day off, when shortly thereafter he did not report two Hispanic workers for engaging in similar misconduct (*id.* at 5a, 11a); to his mischaracterization to Edgar of the substance of his conversations with Peters, including his statements that Peters had stated that he was going to call in sick rather than work, *id.* at 4a, that Peters had refused to say what his plans were and had said they were none of Grado's business, and that Peters had raised his voice or yelled at him. *Id.* at 5a. Grado also exercised his delegated authority when he failed to report to Edgar in a timely manner that Peters had an excused absence, *id.* at 7a-8a, and when he told Peters that he had been fired for failing to work on a day that he knew Peters had a legitimate excuse to miss. *Ibid.*

c. Third, there is ample evidence that would permit a reasonable factfinder to find that Grado's racially motivated conduct was a substantial factor in Peters' ultimate discharge. In particular, there is evidence that would permit a reasonable factfinder to conclude that (1)

Grado would not even have brought the matter to Edgar's attention if Peters had not been black, and, if the matter had not been brought up, Peters would not have been terminated; (2) Grado's biased report to Edgar caused Edgar to decide to terminate Peters; and (3) Grado's discriminatory failure timely to report that Peters had been excused from work caused Edgar not to alter her initial decision to discharge Peters.

As the court of appeals concluded, petitioner's evidence on Edgar's alleged independent investigation was not sufficient to preclude an inference that Grado's discriminatory conduct was a substantial factor in bringing about Peters' discharge. Pet. App. 30a-31a. "This investigation consisted of only one action: directing [Pedersen] to pull [Peters'] personnel file." *Id.* at 30a. That file contained no information on the incident at issue—"so it is difficult to see how reading it could 'independently' confirm what happened." *Ibid.* Edgar relied entirely on Grado for information about Peters' recent absence, and a reasonable factfinder could therefore conclude that Grado's report caused the termination. Indeed, as the court of appeals observed, Edgar "failed to take even the basic step * * * of asking [Peters] for his side of the story." *Id.* at 28a.

2. Petitioner argues (Br. 34-39) that the evidence does not establish that Grado's discriminatory conduct caused Peters' discharge. In making that argument, however, petitioner ignores the rule that, on a motion for summary judgment, all reasonable inferences must be drawn in favor of the non-moving party.

For example, petitioner argues (Br. 38) that there is no evidence that Grado would not have reported Peters to Edgar if he were not black. But a reasonable factfinder could conclude that, in light of Grado's decision

not to report an Hispanic worker who ignored an order to work on her day off, Pet. App. 11a, or another Hispanic worker who defied a direct order to contact Grado during the day, J.A. 36, 267-268, his decision to report his anticipation that Peters would refuse to work on his day off was motivated by Peters' race. That is particularly true in light of all the other evidence of Grado's racial bias. Pet. App. 23a-25a.

Similarly, petitioner argues (Br. 34-36) that there was no material difference between Grado's and Peters' version of events and that Grado's report therefore could not have caused Edgar's decision. But as the court of appeals concluded (Pet. App. 29a-30a), a reasonable factfinder could conclude that there were material differences, including Grado's statement that Peters planned to call in sick, and Grado's statement that Peters refused to tell him what his plans were and instead said that his plans were none of Grado's business. A reasonable factfinder could conclude that Grado fabricated or slanted those details and that he did so precisely because he believed that they would ultimately cause Edgar to discipline or discharge Peters. Indeed, as the court of appeals explained (*id.* at 30a), Edgar's own statements make clear that she viewed each of those statements as important, because she insisted that Grado find out why Peters did not want to work on his day off and denounced Peters' alleged plan to call in sick as an unacceptable deviation from company policy.

Petitioner also ignores the summary judgment standard when it argues (Br. 36) that the timing of when Grado informed Edgar that Peters had been given permission to miss work could not have caused Peters' termination because there is allegedly no evidence that Grado withheld this information from Edgar. In fact,

however, a reasonable factfinder could have concluded that he did withhold this information, both because a human resources official who participated at the meeting in which Peters was terminated seemed surprised when Peters told the group that he had been excused from work, Pet. App. 28a, and because common sense suggests that a human resource official like Edgar would not allow a termination notice to be delivered to an employee stating that the employee was terminated for not showing up for work (*id.* at 8a) if that official knew that the employee had permission not to work.

While Edgar indicated that she received the information that Peters' absence was excused before she made her decision, and that it did not affect her decision, Pet. App. 7a, a reasonable factfinder was not required to credit that statement. Instead, a reasonable factfinder could conclude that if Edgar had found out about the excused absence before Grado informed Peters that he was fired, she would have reconsidered and revoked her decision to fire Peters for failing to show up for work, but that once Peters was told he was fired, Edgar decided to defend the decision to avoid the suggestion that she should have done more to inquire into whether Peters' absence was excused before discharging him.

3. In sum, for present purposes, the EEOC presented more than sufficient evidence to permit a reasonable factfinder to conclude that Grado, acting with a racially discriminatory motive, exercised his delegated authority so as to cause Peters' termination. The court of appeals therefore correctly held that petitioner was not entitled to summary judgment on the EEOC's claim that petitioner discharged Peters because of his race and that, instead, further proceedings are necessary.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
GREGORY G. GARRE
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General

RONALD S. COOPER
General Counsel
LORRAINE C. DAVIS
Acting Associate General Counsel
SUSAN R. OXFORD
Attorney
Equal Employment Opportunity Commission

MARCH 2007

989

(14)

No. 06-341

SUPREME COURT U.S.
FILED
APR 9 2007
OFFICE OF THE CLERK

In the Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

THOMAS C. GOLDSTEIN
AKIN GUMP STRAUSS HAUER & FELD LLP
ROBERT S. STRAUSS BUILDING
1333 HAMPSHIRE AVENUE, NW
WASHINGTON, D.C. 20036
(202) 887-4060

Co-Counsel for Petitioner

ERIC TODD PRESNELL
Counsel of Record
KARA E. SHEA
T. HAROLD PINKLEY
DAVID L. JOHNSON
MILLER & MARTIN PLLC
1200 ONE NASHVILLE PLACE
150 FOURTH AVENUE NORTH
NASHVILLE, TENNESSEE 37219
(615) 244-9270

Counsel for Petitioner

April 9, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. RESPONDENT'S DELEGATED AUTHORITY STANDARD DOES NOT FOCUS ON THE RELEVANT AGENT UNDER TITLE VII AND PRESENTS A LESS PRACTICAL APPROACH TO CAPTURING DISCRIMINATION IN THE WORKPLACE. 2

II. RESPONDENT'S ANALYSIS OF THE TWO-PART CAUSATION INQUIRY BOLSTERS BCI'S ARGUMENT THAT THE TENTH CIRCUIT ERRED IN ITS CAUSATION ANALYSIS 9

III. GRADO'S ALLEGED RACIAL MOTIVATION WAS NEITHER THE CAUSE IN FACT NOR THE PROXIMATE CAUSE OF PETERS'S TERMINATION; THUS, BCI PREVAILS EVEN UNDER RESPONDENT'S STANDARD 14

CONCLUSION 19

TABLE OF AUTHORITIES

Cases:

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,
515 U.S. 687 (1995) 10

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) 3, 4

Burlington N. & Santa Fe Ry. Co. v. White,
126 S.Ct. 2405 (2006) 2

Cone v. Longmont United Hosp. Ass'n,
14 F.3d 526 (CA10 1994) 15

Edwards v. Grand Casinos of Miss., Inc., No. 05-60030,
145 Fed. Appx. 946 (CA5 Aug. 18, 2005) 15, 16

Hall v. Bodine Elec. Co., 276 F.3d 345 (CA7 2002) . . . 9

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 10

Holmes v. Secs. Investor Prot. Corp.,
503 U.S. 258 (1992) 10

Hong v. Children's Mem'l Hosp.,
993 F.2d 1257 (CA7 1993) 15

Lissau v. S. Food Serv., Inc.,
159 F.3d 177 (CA4 1998) 8

Long v. Eastfield Coll., 88 F.3d 300 (CA5 1996) 13

Mitchell v. Toledo Hosp., 964 F.2d 577 (CA6 1992) . . 16

Parkins v. Civil Constructors of Ill., Inc.,
163 F.3d 1027 (CA7 1998) 8

Shager v. Upjohn Co., 913 F.2d 398 (CA7 1990) 13

Statutes:

42 U.S.C. § 2000e–2(a) 2

Regulations, Restatements, and Treatises:

29 C.F.R. § 1604.11(d) 9

RESTATEMENT (SECOND) OF TORTS § 431 (1965) 10

RESTATEMENT (SECOND) OF TORTS § 433 (1965) 10

W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS (5th ed. 1984) 10

ARGUMENT

In their opening briefs, BCI and its *amici* established that, in this case, the Tenth Circuit read too broadly the scope of employers' liability under Title VII for discriminatory acts of a supervisory employee who was *not* the decisionmaker for the challenged employment action. Respondent's brief does not salvage or justify that flawed ruling. If anything, Respondent implicitly identifies additional errors in the decision below, particularly the Tenth Circuit's failure to analyze whether the supervisor's conduct was a "proximate cause" of the employment action.

The arguments Respondent advances lack merit. Respondent focuses its attention on the supervisor as an "agent" for certain purposes. But Title VII does *not* hold employers liable for *all* biased acts of their agents; rather, the statute applies only to certain specified kinds of employment actions, such as termination from employment. Applied correctly, the statute does not impose liability on BCI for the conduct of its supervisor in this case: reporting an employee's insubordination, allegedly with a racial motivation. The covered employment action in this case was instead undertaken by a *different* "agent," who is not alleged to have harbored any bias. Separately, although Respondent correctly recognizes the importance of the proximate causation inquiry that the Tenth Circuit failed to require, it misapplies that requirement. Causation does not exist when the actual decisionmaker has made an independent decision without knowing or having reason to know of discriminatory bias by lower-level employees. As regards this case, the undisputed facts reveal that BCI's actual decisionmaker, Edgar, independently decided to terminate Peters solely because of his insubordinate misconduct and without even knowing his race. Although in light of these facts BCI should

win even under Respondent's standard, BCI's suggested standard better matches the intended scope of Title VII liability without imposing on employers the burden of impractical investigations which Respondent's standard necessarily entails.

I. RESPONDENT'S DELEGATED AUTHORITY STANDARD DOES NOT FOCUS ON THE RELEVANT AGENT UNDER TITLE VII AND PRESENTS A LESS PRACTICAL APPROACH TO CAPTURING DISCRIMINATION IN THE WORKPLACE.

1. Respondent's strategy in this case is to place this Court's focus on Grado as Peters's supervisor, characterizing Grado as an "agent" acting within the "scope of his authority." Under Respondent's view, BCI is liable for Grado's conduct if that conduct was a factual and legal cause of Peters's termination. Yet, that is not how the statute operates. Title VII does *not*, as Respondent assumes, render employers liable for all acts of their agents. Rather, it applies only to agents' actions that constitute adverse employment actions as particularly specified in the statute. To be actionable, the allegedly discriminatory conduct must involve certain tangible or adverse employment actions such as hiring and discharging, or actions with respect to "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1); *see also Burlington N. & Santa Fe Ry. v. White*, 126 S.Ct. 2405, 2411-12 (2006).

Nothing that Grado did—even assuming he was motivated by bias and was acting within the scope of his delegated authority—rises to the level of an adverse employment action under Title VII. *See* 42 U.S.C. § 2000e-2(a)(1); *White*, 126 S.Ct. at 2411-12. Rather, the only potentially actionable

adverse employment action at issue is Peters's termination, a decision undeniably delegated to, and made by, Edgar. JA 18, 31, 86–87, 91–92. Thus, though Grado may have been BCI's agent for certain purposes, he was not BCI's agent for the purpose of making termination decisions, nor did he exert a sufficient level of influence to become BCI's agent (the *de facto* decisionmaker) with respect to Peters's termination. Pet. Br. 24–25.

Respondent relies on the truism that "'principals or employers'" are "'vicariously liable for acts of their agents or employees in the scope of their authority or employment.'" Resp. Br. 17 (citation omitted). It may be, as Respondent asserts, Resp. Br. 36–37, that Grado was acting within the scope of his employment and thus as an "agent" of BCI. But as discussed above, that is not the relevant question. Title VII by its terms simply does not render an employer liable for *all* tortious conduct of its agents. The cases cited by Respondent involve situations in which "[t]angible employment actions fall within the special province *of the supervisor*." *Burlington Indus., Inc. v Ellerth*, 524 U.S. 742, 762 (1998) (emphasis added). The Court held in that circumstance that "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." *Id.*

Respondent asserts to the contrary that the holding of *Ellerth* "logically applies *whenever* a supervisor's 'discriminatory act' of a type that a supervisor is empowered to perform because of his supervisory capacity '*results in* a tangible employment act.'" Resp. Br. 21 (quoting *Ellerth*, 524 U.S. at 760) (first emphasis added). But Respondent notably gives no explanation for this supposedly "logical" extension of Title VII, which does not reflect the statute that Congress actually took the care to frame and enact. Nor does the dictum from *Ellerth* quoted by Respondent stand for the

broad proposition for which it is invoked; the preceding sentence explains that the Court's holding addresses circumstances "when a supervisor *takes* a tangible employment action against the subordinate." *Ellerth*, 524 U.S. at 760 (emphasis added). In fact, this Court in *Ellerth* adopted a distinct rule—which, critically, Respondent ignores—for situations in which the supervisor does not take an adverse employment action. 524 U.S. at 765.

2. Not only does BCI's standard focus properly on the relevant agent under Title VII, but it also provides a superior framework for analyzing claims based on allegations of subordinate bias because it more effectively captures actionable workplace discrimination without imposing impractical and unduly burdensome standards on employers. For example, Respondent's position that employers are not liable for the racially motivated report of an "ordinary employee" loses footing by a comparison to BCI's EEO policy. JA 26–27. This policy provides that "all employees are likewise obligated . . . to report incidents of harassment or discrimination to responsible managers without delay." *Id.* Suppose that one of Peters's co-workers were to report—falsely and for racially motivated purposes—to BCI's HR Manager that Peters had sexually harassed her. Under the EEO policy, the reporting employee would be exercising delegated authority. Suppose further that this female employee had been previously reported and disciplined for making racial slurs against African-American coworkers. If the HR Manager thereafter terminated Peters for this alleged conduct, Respondent's proposed standard would preclude liability—even though the reporting employee was acting within the scope of her delegated authority and even though the HR Manager at least should have known of her bias. By contrast, BCI's standard could hold employers liable based on negligence and causation. *See* Pet. Br. 28–32.

Similarly, suppose a high-ranking manager working in a finance position in BCI's regional offices in Phoenix (with no supervisory authority over employees in Albuquerque) were known to be intolerant of female workers and to frequently state his wish to rid the BCI workforce of female employees. Suppose this manager falsely reported to Edgar that he heard that one of BCI's female merchandisers was incompetent. Suppose the manager demanded that Edgar fire the female merchandiser, and Edgar felt so intimidated by the manager's level of influence that she accepted his report at face value and fired the female merchandiser on the spot, notwithstanding that she herself harbored no gender bias against the female merchandiser. Under such a scenario, BCI would not be liable under Respondent's standard, which excludes liability based on the reports of coworkers as well as on the reports of supervisory level employees acting outside of the scope of their delegated authority. Resp. Br. 23. By contrast, BCI's standard would preclude summary judgment for BCI in this hypothetical scenario based on the fact that the biased manager was the *de facto* decisionmaker.

3. Respondent applies a mistakenly cramped view of the scope of the respondeat superior theory of vicarious liability relied upon by BCI. Respondent states that BCI's "actual decisionmaker" standard would not capture discrimination where a biased, low-level supervisor with no disciplinary authority recommended discharge for racially motivated reasons. Resp. Br. 26. BCI's standard, in fact, could capture the discrimination in such a scenario via either of two avenues. First, if the biased recommendation were rubber-stamped by the formal decisionmaker without an independent evaluation, then liability would attach. *See* Pet. Br. 21–24. Second, were the bias of the low-level supervisor reported or otherwise known or knowable to BCI's decisionmaker, then BCI would be liable if it failed to respond appropriately to the

bias or otherwise allowed the biased recommendation to be a substantial factor in the discharge decision. Pet. Br. 28–32. Thus, contrary to Respondent's claim, BCI's standard would preclude summary judgment where an employee who is not the actual decisionmaker had generated a false report (or selectively generated an accurate report) which was a motivating factor for an employment decision, so long as the employee could present evidence that the employer knew or should have known that the employee bringing the report was biased. By contrast, Respondent's standard would preclude liability under such a scenario unless the employee bringing the false or selective report had been a supervisor acting within the scope of his delegated authority.

4. Respondent's disparagement of BCI's second avenue of employer liability—negligence and causation—fails to properly acknowledge its scope, its fulfillment of the objectives of Title VII, and its grounding in employer liability for coworker sexual harassment.

a. Respondent asserts that expanding the scope of liability "creates an incentive for employers to intensify their efforts to prevent their agents from causing harm." Resp. Br. 21. That manifestly is not correct, as this case demonstrates. All agree that BCI did everything possible to root out discrimination in the workplace. Among other things, BCI had adopted effective, mandatory antidiscrimination policies and reporting procedures, and, despite the company's best efforts, it had no reason to suspect that Peters's termination was infected by racial bias. A rule holding companies such as BCI liable in these circumstances would actually diminish the incentive to create and enforce such policies. Employers would have less incentive to incur the expense of creating and maintaining these policies and processes if liability would be imposed regardless.

Moreover, Congress did not determine to impose employer liability at all costs; rather, it designed a balanced scheme that also accounts for the realities of the American workplace, which is sometimes difficult to police by even the most attentive employer. Congress could have adopted a statute that would have created a damages-driven incentive for employers to make Herculean efforts to investigate each and every employment decision for racial bias. But that approach would have imposed extraordinary inefficiencies and costs and would have distracted employers from investigating those cases in which there were actually apparent reasons to suspect discrimination.

Tellingly, Respondent identifies no additional measures that BCI could have implemented to discover Grado's alleged bias. It is undisputed that BCI maintained a strong anti-discrimination policy and a procedure for employees to report discriminatory conduct. *See* JA 26–27. It is undisputed that Peters had received and was aware of these policies and procedures. *See* JA 305–06. It is further undisputed that BCI surpassed mere compliance with Title VII's design of encouraging the adoption of such policies by also providing training in diversity and in Title VII issues for its managers (including non-decisionmaking managers) and by implementing a centralized decisionmaking process, thereby fostering consistency in the making of disciplinary decisions by well-trained personnel. JA 18, 24–25, 45.

As to the case at bar, no one utilized these processes to alert BCI about Grado's alleged behavior so that BCI could address it. *See* JA 49, 323–24. Peters (now) claims that he and other African-American employees had been subjected to disparate treatment by Grado for years. JA 106, 193–201. Yet, he never reported Grado. JA 323–24. Instead, he waited until he had been terminated, after a run-in with

Grado, in which he himself undeniably acted inappropriately, then went directly to the EEOC with his belated complaints of bias. He never afforded BCI the opportunity to address Grado's alleged bias, not even when given an opportunity to respond in the meeting when he was terminated. JA 221–22; *see infra*, p. 19.

Respondent thus seeks to hold BCI liable for the unknown and unknowable discrimination of Grado and thereby to vaguely encourage BCI and others to "intensify their efforts." In other words, Respondent seeks to hold BCI liable despite its obvious best efforts in this regard and does so without suggesting what additional policies BCI should or could have implemented to discover this conduct. In this situation, Congress simply could not have intended for Grado to be considered an agent so as to subject his employer to liability.

b. Respondent's criticism of BCI's negligence standard as "minimal" fails to appreciate its scope. BCI's negligence standard finds roots in Title VII jurisprudence on employer liability for coworker (as opposed to supervisory) harassment. Respondent concedes that "the question presented here concerns the employer's vicarious liability for the conduct of one employee toward a fellow employee." Resp. Br. 26. This conclusion is correct because it is undisputed that Grado, although a supervisor for some purposes, had no authority to impose discipline on Peters. In the arena of adverse employment actions, therefore, the relationship between Grado and Peters is better characterized as coworker instead of supervisor-subordinate. *Cf., e.g., Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1034 (CA7 1998); *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 179 (CA4 1998). Under such circumstances, tying an employer's liability to its negligence in discovering bias is best analogized to the negligence standard for employer liability in coworker

harassment cases as adopted by the courts of appeals and the EEOC. *See, e.g., Hall v. Bodine Elec. Co.*, 276 F.3d 345, 356 (CA7 2002); 29 C.F.R. § 1604.11(d). Applying that standard, BCI should not be held liable because it had appropriate anti-discrimination policies and reporting mechanisms in place, and Respondent has produced no evidence that BCI was negligent in failing to discover Grado's alleged bias.[1]

II. RESPONDENT'S ANALYSIS OF THE TWO-PART CAUSATION INQUIRY BOLSTERS BCI'S ARGUMENT THAT THE TENTH CIRCUIT ERRED IN ITS CAUSATION ANALYSIS.

1. In stark contrast to the Tenth Circuit's opinion, Respondent is correct to recognize that an employer's liability under Title VII requires a plaintiff to satisfy a two-part causation inquiry: (1) that the alleged bias was a cause in fact of the adverse employment action; and (2) that the bias proximately caused the adverse action. Resp. Br. 30–31. This analysis recognizes implicitly that the Tenth Circuit's causation analysis did not include a proximate, or legal,

---

[1] Respondent states that "it did not conduct a full-scale investigation into petitioner's claims about the quality of its training and monitoring program." Resp. Br. 29 n.3. This is inaccurate. Respondent specifically sought an injunction against BCI regarding its policies and procedures, JA 7 ¶ B, and this matter was the subject of BCI's motion for summary judgment. *See* JA 15–16; *compare* BCI's Memorandum of Law in Support of Motion for Summary Judgment, Trial Record at No. 66, p. 25, *with* EEOC Reply Memorandum, Trial Record at No. 73, pp. 25–29. The District Court pretermitted this issue, Pet. App. 75a n.12, but Respondent did not appeal this aspect of the case, *see* Pet. App. 14a.

causation inquiry but rather only a cause-in-fact, or but-for, analysis. *See* Pet. App. 26a–30a.

Under the appropriate proximate causation inquiry, alleged bias would be considered a proximate cause of an adverse employment action where it is a "substantial factor" in the ultimate action and there is no policy or rule of law that would nonetheless preclude a finding of liability. *See* RESTATEMENT (SECOND) OF TORTS § 431 (1965). In other words, once cause-in-fact has been found, "there remains the question whether the defendant should be legally responsible for the injury." W. PAGE KEETON, ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 42, p. 273 (5th ed. 1984); *see also Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (using "'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts"); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 713 (1995) (O'Connor, J., concurring) ("Proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences."). The inquiry whether a supervisor's conduct constitutes a sufficient "substantial factor" considers all the "factors which contribute in producing the harm and the extent of the effect which they have in producing it" and "whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible." RESTATEMENT (SECOND) OF TORTS § 433(a)–(b). Respondent seemingly recognizes that the bottom-line question is whether a prohibited characteristic "'played a role in th[e] process and had a *determinative influence* on the outcome." Resp. Br. 31 (quoting *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993)).

2. Respondent's argument that a post-incident investigation is necessary to break the causal chain is not supported by the text of Title VII, and it betokens no practical application in today's workplace. Although Respondent acknowledges that Title VII does not require employers to conduct workplace investigations, it effectively seeks to impose, like the Tenth Circuit, a *de facto* requirement that the appointed decisionmaker conduct a comprehensive workplace investigation, including interviewing the affected employee[2]

---

[2] Of course, if questioned by Edgar, Peters, if truthful, could only have admitted that: (1) BCI was experiencing a merchandiser shortage and that he was the only merchandiser available for Sunday coverage; (2) he had worked fewer scheduled days off the preceding year than his white and Hispanic coworkers; (3) he refused both Katt's and Grado's requests to come to work Sunday based, at least in part, on his "plans"; (4) he persisted in this refusal even after being ordered to work by Grado and after being told that his conduct would be considered insubordination; (5) he told Grado to "do what you have to do"; (6) *after* unequivocally refusing to come in on Sunday, he visited a clinic and called in sick to Katt; (7) he felt well enough to work Friday and Monday, but not Sunday, the day he *already* had refused to work; (8) he made no attempt to contact Grado over the weekend, despite having been openly defiant to him on Friday and having been told his job was in jeopardy; and (9) he had previously been disciplined for insubordination by a different supervisor. *See* Pet. Br. 3–12. In other words, whatever Peters might have said in protest, Edgar could have learned nothing that would have affected her decisionmaking process. Indeed, even had she learned Grado was an alleged racist, given all of the *undisputed* facts regarding Peters's conduct, Edgar's thought processes, and BCI's policies, the termination would have (and should have) occurred regardless. *Id*; JA 45–46, 51. Thus, Edgar's failure to speak directly to Peters is, in *this* case, immaterial.

and other relevant witnesses, before taking any adverse employment action. Resp. Br. 14, 33–35.

Yet, the impractical and unduly burdensome nature of an investigation requirement is illuminated when the requirement is viewed as a universal rule governing the myriad of adverse employment actions in the workplace. For instance, suppose a panel of ten supervisory-level employees were to interview twenty job applicants. After interviewing, all ten supervisors provide recommendations to a human resources representative who has been delegated sole decisionmaking authority for filling the position. Suppose the supervisors overwhelmingly endorse the twentieth candidate; as a result, the other nineteen candidates could potentially have been subjected to an adverse employment action under Title VII (i.e., not being hired).

Under Respondent's standard, in order to avoid potential liability for a failure-to-hire claim, *before making a final hiring decision* the human resources representative would be required to presume as a matter of course that the interview process had been potentially tainted by discriminatory bias and would have to conduct an investigation to ferret it out, should it exist. In other words, the human resources representative would have to investigate to confirm the absence of any discriminatory bias before proceeding to make the hiring decision. According to Respondent's theory, this investigation would include, at minimum, directly contacting all nineteen unsuccessful job applicants in order to obtain their side of the story and investigating the possibility of unreported bias on the part of the interviewers. Applying Respondent's mandatory assumption of discriminatory bias and its attendant investigation requirement to all workplace decisions where input from supervisors acting within the scope of their delegated authority, potentially could have resulted in adverse employment actions—*e.g.*, denial of pay raises, bonus

payments, and promotions, demotions, transfers, and all other disciplinary actions short of termination—would impose extraordinary burdens on employers. This proposed standard is unrealistic and untenable.

3. Rather than impose an impractical rule requiring a post-action investigation, the more prudent approach is to hold that a plaintiff meets her burden of proving proximate causation (after having proven cause in fact) when she shows, at a minimum, that the decisionmaker failed to make an independent decision. Congressional policies behind Title VII dictate that an employer should not be legally responsible under Title VII if its relevant agent, the decisionmaker, makes an independent decision and had no reason to know that bias was somehow involved at a lower level.

Respondent's reliance upon the *Shager* and *Long* decisions as support for an investigation requirement, *see* Resp. Br. 33, is misplaced. These decisions contemplate an independent *decision*—not an independent, full-blown *investigation*—as breaking the causal chain. *See Shager v. Upjohn Co.*, 913 F.3d 398, 406 (CA7 1990) (stating that "there would be no ground for finding even an innocent violation of the Act" had the decisionmaker "made an independent decision to fire Shager"); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (CA5 1996) (although using the term "independent investigation," relying upon *Shager*'s independent-decision analysis); *see also* Pet. Br. 29 and cases cited therein. Stated differently, under the appropriate proximate-causation inquiry the causal chain would be deemed broken when the decisionmaker has made an independent decision without knowing or having reason to know that a subordinate in the chain had harbored discriminatory animus. In that situation, considerations of fairness dictate that liability should not be imposed.

III. GRADO'S ALLEGED RACIAL MOTIVATION WAS NEITHER THE CAUSE IN FACT NOR THE PROXIMATE CAUSE OF PETERS'S TERMINATION; THUS, BCI PREVAILS EVEN UNDER RESPONDENT'S STANDARD.

Respondent presented very weak evidence of bias in this case.[3] Assuming Grado harbored such bias, however, even under Respondent's proposed standard summary judgment should have been granted because: (1) there is no proof permitting the reasonable conclusion that Grado engaged in a discriminatorily motivated use of delegated authority which was a substantial factor in bringing about a tangible employment action; and (2) policy considerations exist that nonetheless break any causal chain and preclude BCI's liability.

---

[3] The after-the-fact declaration testimony of Peters and other BCI employees consists primarily of vague and conclusory allegations that Grado treated African American employees "worse" than other employees and told inappropriate racial jokes. JA 106, 193-201. None of this conduct is alleged to have been directed toward Peters, who was never written up by Grado prior to the incident leading to his termination, JA 104, except for the extremely equivocal testimony of Katt that Grado "might" have used the "n" word towards Peters after he was terminated, when Grado learned that Peters was suing BCI. JA 277. Further, the Tenth Circuit and Respondent highlight that "fewer than 2%" of BCI's Albuquerque employees were African American without explaining its relevance or comparing that percentage to Albuquerque's demographics. Pet. App. 2a; Resp. Br. 2. Indeed, the District Court found that this fact was not "sufficient to create a genuine issue of material fact on the issue of pretext, and the EEOC does not explain how it does." Pet. App. 71a–72a n.10.

1. Under a cause-in-fact analysis, Respondent must submit evidence that Grado's bias was the but-for cause in his decision to involve Edgar—the only delegated authority he had in the disciplinary arena. *See, e.g., Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (CA10 1994); *Hong v. Children's Mem'l Hosp.*, 993 F.2d 1257, 1265-66 (CA7 1993). As the District Court found, Respondent failed to present sufficient evidence connecting Grado's alleged racial bias to his decision to involve Edgar, which he did *before* Peters was insubordinate. Pet. App. 67a-68a. Although both the Tenth Circuit and Respondent appear to assume that this causal nexus exists in this case, the record shows otherwise. For instance, Respondent conclusorily asserts that there is evidence from which a jury could conclude that Grado would not have reported Peters to Edgar were he not African American. Resp. Br. 38-39. As the District Court recognized, however, the Hispanic employees who supposedly received more favorable treatment than Peters—Monica Lovato and Arturo Lopez—were not similarly situated to Peters as a matter of law and were therefore not proper comparators to Peters for purposes of determining whether Grado's supposed racial bias resulted in racially selective reporting of offenses.[4] *See* Pet. App. 67a; *see also*

---

[4] Respondent assumes as a fact the Tenth Circuit's statement that affiant Bryan Esquibel "gave a number of examples of Hispanics who had engaged in insubordination, but who were not fired." Resp. Br. 7 (citing Pet. App. 25a, which cited to Esquibel Aff., JA 197 ¶ 8). The Tenth Circuit's statement, however, did not say that these employees were insubordinate, but only that they did not obey directives. Pet. App. 25a. There is a dispositive and undisputed distinction between an employee's failure to carry out directives and insubordinate conduct. *See* JA 20. Moreover, the assumption that these employees were Hispanic, Pet. App. 25a; Resp. Br. 7-8, is not supported by the record. *See* JA 197, ¶ 8.

Edwards v. Grand Casinos of Miss., Inc., No. 05-60030, 145 Fed. Appx. 946, 948 (CA5 Aug. 18, 2005); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (CA6 1992).

For instance, the following distinguishing facts are undisputed with respect to Lovato: (1) unlike Peters, Lovato never dealt directly with Grado, who only found out about Lovato's conduct the week after it occurred, JA 274–75; (2) unlike Peters, Lovato, although initially expressing reluctance to come to work on her birthday weekend, ultimately *agreed* to do so; she did not state that she was refusing to come in and did not tell Grado (or Katt for that matter) that he should just do what he had to do, after being warned that she was being insubordinate and could be terminated, *Id.*; Pet. App. 67a; (3) Lovato failed to show up for work, committing an attendance violation; her conduct, unlike Peters's conduct, did not meet the definition of insubordination under BCI's policies. JA 36–37, 48, 274–76; Pet. App. 67a. As the District Court recognized, a "no show" violation cannot be compared to the blatant defiance displayed by Peters. Pet. App. 67a.

With respect to Lopez, the following facts are undisputed: (1) he failed to return both Katt's and Grado's pages, at which time Grado instructed him (via text message) that failure to return the page could lead to his termination, JA 36; (2) unlike Peters, however, Lopez did not respond by openly defying Grado and telling him to "do what you have to do"; (3) Lopez, in fact, never responded at all, because he had already quit his employment with BCI, JA 36, 48, 188–92; (4) once Grado realized Lopez had walked off the job without notice, he reported that fact to Pedersen, and Lopez was deemed to have abandoned his job and was designated as

ineligible for rehire. JA 35, 48, 295. This situation bears no resemblance to Peters's conduct toward Grado.[5]

In addition, both the Tenth Circuit and Respondent approach this case under the impression that Grado observed Peters's misconduct and reported it to Edgar who then performed a post-incident evaluation. This is an incorrect characterization of what actually occurred. Grado actually contacted Edgar *before* Peters made the insubordinate statements. JA 33. Respondent fails to point to any facts permitting the conclusion that Grado was motivated to do so by any factor other than his undisputedly desperate need for coverage on Sunday. JA 31–32, 38–41. Grado then followed Edgar's instructions by ordering Peters to work on Sunday. Certainly, neither Grado nor Edgar could have predicted Peters's shocking response ("do what you have to do."). Grado then properly followed up to let Edgar know Peters's response, just as any competent unbiased supervisor would have done, and the matter was then taken out of his hands.

Nor is there evidence that Grado reported any false or slanted information to Edgar, or withheld any information from Edgar, which subsequently influenced her decision. As the District Court correctly concluded, the discrepancies between what Grado told Edgar and what Peters admits happened are immaterial. Grado merely told the truth about Peters's conduct, which was more than sufficiently egregious by Peters's own account to warrant termination under BCI policy, or even in the absence of such a policy.

---

[5] It is also undisputed that Grado *did* report both Lopez and another Hispanic merchandiser, Damian Mirabel, to Human Resources for performance and attendance issues, and that Mirabel was terminated for unsatisfactory performance. JA 35, 48.

2. Respondent did not submit sufficient evidence that Edgar failed to make an independent decision; consequently, any causal chain arising from Grado's involving of Edgar is broken, and there is no proof of proximate causation. Although the Tenth Circuit stated that Edgar "relied exclusively" on information supplied by Grado, Pet. App. 2a, the District Court found that the undisputed facts showed that "Edgar did take some steps to more closely evaluate the situation," Pet. App. 63a, and even Respondent concedes that Edgar relied "*almost* entirely" on Grado's report. Resp. Br. 15 (emphasis added). The undisputed facts, moreover, show that Edgar's decision was based on more than just Grado's accurate report. Edgar also: (1) instructed Grado to obtain more facts, JA 18–19, 33; (2) reviewed Peters's personnel file wherein she found that Peter's had been placed on "Final Warning" for a previous insubordination incident, JA 46; (3) evaluated Peter's allegation of sickness, JA 22–23;[6] (4) evaluated his failure to appear on Sunday, *id.*; (5) evaluated his failure to call Grado about his sickness, JA 22–23; and (6) evaluated the bad precedent it would set for other employees if this employee could essentially dictate the times he would and would not work, *id.* In light of the

---

[6] Respondent is incorrect to suggest that Edgar did not know about Peters's claim of sickness before she made the decision terminate because Grado "communicated to Peters at 5 p.m. that he should meet him the following morning." Resp. Br. 6. The support for this statement is Peters's deposition testimony, JA 217–19, which actually does not state that Grado told Peters about the meeting at 5 p.m. on Monday, October 1, 2001. Rather, Peters's testimony was that he "worked until 5:00" and spoke with Grado later "that evening." JA 218. The District Court correctly understood this undisputed evidence. Pet. App. 45a. There is simply no evidence to support the argument that Edgar was not aware of Peters's sickness claim before she made the decision to terminate.

undisputed fact that Edgar did not know—and could not have known—of Grado's alleged bias, this evaluation serves to break the chain of causation.

Finally, the Tenth Circuit and the Respondent criticize Edgar's failure to "get Peters's side of the story." Resp. Br. 35; Pet. App. 28a. Yet, both crucially ignore the meeting held on Tuesday, October 2, 2001 among Peters, Grado, Grado's manager (Don Bateluna), and HR member Sherry Pedersen. JA 219–220. In this meeting, Peters was confronted with his insubordinate conduct and permitted to respond. JA 220. Peters's response did not include a denial of his insubordinate conduct on Friday, September 28. JA 220–21; nor did his response include allegations that Grado had reported the insubordinate conduct because of his racial bias, *id.*; nor did his response include any complaints about Grado's alleged prior racially motivated conduct, *id.* Rather, Peters's response was that he "had reported off work because [he] wasn't feeling well." JA 221. Peters, therefore, had ample opportunity to raise his allegations of Grado's racial conduct before Grado's manager and an HR employee. Yet, just like all times before, he remained silent, and this silence negated any need for a heightened decisionmaking process by Edgar. Importantly, Peters's last conduct—remaining silent about discrimination in the workplace and threatening legal action—is antithetical to the objectives of Title VII. As a matter of law, BCI should not be held liable for its termination of Peters for his admitted insubordinate conduct.

CONCLUSION

For all of the foregoing reasons, the Tenth Circuit's decision should be reversed and the District Court's decision affirmed and reinstated.

Respectfully submitted,

ERIC TODD PRESNELL
Counsel of Record
KARA E. SHEA
T. HAROLD PINKLEY
DAVID L. JOHNSON
MILLER & MARTIN PLLC
1200 ONE NASHVILLE PLACE
150 FOURTH AVENUE NORTH
NASHVILLE, TENNESSEE 37219
615-244-9270

THOMAS C. GOLDSTEIN
AKIN GUMP STRAUSS HAUER &
FELD LLP
ROBERT S. STRAUSS BUILDING
1333 NEW HAMPSHIRE AVENUE, NW
WASHINGTON, D.C. 20036
202-887-4060

480c

No. 06-341

IN THE

Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Courts of Appeals for the Tenth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

LEWIS S. EIDSON
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500

President,
American Association for Justice

JEFFREY L. NEEDLE *
Law Office of Jeffrey Needle
119 First Ave. South
Suite 200
Seattle, WA 98104
(206) 447-1560
*Counsel of Record
Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 6

I. A CLEAR RULE WHEN A SUBORDINATE'S BIAS MAY BE IMPUTED TO THE EMPLOYER IS CRUCIAL IN TITLE VII DISCRIMINATION CASES, UNDER EITHER SHIFTING-BURDENS OR MIXED-MOTIVES FRAMEWORK. 6

II. AGENCY THEORY SUPPORTS IMPUTING LIABILITY WHERE THE BIASED EMPLOYEE WAS THE CAUSE OF THE TERMINATION WITHOUT ANY INTERVENING SUPERSEDING CAUSE. 10

A. The Biased Supervisor Was Acting Within the Scope of Employment 11

B. The Employer's Investigation is Not a Superseding Cause Sufficient to Break the Causal Chain. 14

III. TITLE VII REQUIRES THE EXHAUSTION OF ADMINISTRATIVE REMEDIES PRIOR TO SUIT. 18

IV. CORPORATE EMPLOYMENT POLICIES ARE NOT A SUBSTITUTE FOR THE ADMINISTRATIVE PROCESS OR JUDICIAL ENFORCEMENT OF TITLE VII 19

A. Employers Have a Strong Incentive to Implement Anti-Discrimination Policies. 23

B. A Title VII Plaintiff is Not Required to Complain About Discrimination to Corporate Human Resources. 25

V. THE ALLEGED BURDEN ON EMPLOYERS IS VASTLY OVERSTATED. 26

A. The Defendant Preserves All Defenses Regardless of Imputed Liability 26

B. An Adequate Investigation Must Determine the Truth of the Allegations and That They Are Not Pretextual 28

C. An Adequate Investigation Does Not Impose An Undue Burden On Employers 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Barnes v. St. Catherine's Hospital, 563 F.2d 324 (7th Cir. 1977).....25

Brown v. General Services Administration, 425 U.S. 820 (1976).....18

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).....14, 23, 25, 29

Cadena v. Pacesetter Corp., 224 F.3d 1203 (10th Cir. 2000).....24

Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).....9

E.E.O.C. v. AIC Security Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995) 10

Equal Employment Opportunity Commission v. BCI Coca-Cola Bottling Company of Los Angeles, 450 F.3d 476 (10th Cir. 2006) 6

Equal Employment Opportunity Commission v. Warfield-Rohr Casket Co., Inc., 364 F.3d 160 (4th Cir. 2004).....8

Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830 (1996).....16

Faragher v. Boca Raton, 524 U.S. 775 (1998) 1, 11, 13, 14

Farr v. NC Machinery Co., 186 F.3d 1165 (9th Cir. 1999).....16

Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir.), *cert. denied*, 516 U.S. 1011 (1995).....10

Grant v. Lone Star Co., 21 F.3d 649 (5th Cir. 1994) 10

Griffith v. City of Des Moines, 387 F.3d 733 (8th Cir. 2004) 9

Hillstrom v. Best Western TLC Hotel, 354 F.3d 27 (1st Cir. 2003) 8

Holly D. v. California Institute of Technology, 339 F.3d 1158 (9th Cir. 2003) 23

Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999) 12, 24

Kotcher v. Rosa & Sullivan Appliance Center, Inc., 957 F.2d 59 (2nd Cir. 1992) 14

Lenhardt v. Basic Institute of Tech. Inc., 55 F.3d 377 (8th Cir. 1995) 10

Lewis v. Young Men's Christian Ass'n, 208 F.3d 1303 (11th Cir. 2000) 8

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 7, 9, 27

McGinest v. GTE Service Corp., 360 F.3d 1103 (9th Cir. 2004) 9

Miller v. Maxwell's Intern. Inc., 991 F.2d 583 (9th Cir. 1993) 10

Obrey v. Johnson, 400 F.3d 691 (9th Cir. 2005) 26

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 7, 11

Rachid v. Jack in the Box, Inc., 376 F.3d 305 (5th Cir. 2004) 8

Reeves v. Sanderson Plumbing, 530 U.S. 133 (2000) 11

Sauers v. Salt Lake County, 1 F.3d 1122 (10th Cir. 1993) 10

Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990) .14

Smith v. Lomax, 45 F.3d 402 (11th Cir. 1995).....10

Springer v. Seaman, 821 F.2d 871 (1st Cir. 1987),.....15, 16

Stegall v. Citadel Broadcasting Co., 350 F.3d 1061 (9th Cir. 2003).....8

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 7

Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995).10

Vinieratos v. United States Air Force, 939 F.2d 762 (9th Cir.1991).....18

Wathen v. General Electric Co., 115 F.3d 400 (6th Cir. 1997).....10

Watson v. Southern Pennsylvania Transportation Authority, 207 F.3d 207 (3rd Cir. 2000).....8

Wright v. Murray Guard Inc., 455 F.3d 702 (6th Cir. 2006).....9

STATUTES AND REGULATIONS

42 U.S.C. § 2000e-16(c) 18

42 U.S.C. § 2000e 16(c); 18

42 U.S.C. § 2000e 2(a)(1).....7

42 U.S.C. § 2000e 2m 7, 9

42 U.S.C. § 2000e 5(b).....19

42 U.S.C. § 2000e 5(e)(1).....19

42 U.S.C. § 2000e 5(f)(1) 19

42 U.S.C. § 2000e 5(g)(2)(B).....8, 29

42 U.S.C. § 2000e(b).....9

42 U.S.C. § 2000e-16(c) 18

29 C.F.R. §1614.401 18

29 C.F.R. §1614.407 18

29 C.F.R. § 1614.105(a)(1).....18

29 C.F.R. § 1614.110(a) 18

OTHER AUTHORITIES

Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 Berkeley J. of Emp. and Labor Law 1 (2001) ..22

John M. Darley & Paget Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. Personality & Soc. Psychol. 20 (1983).....21

John M. Darley & Russell H. Fazio, *Expectancy Confirmation Processes Arising in the Social Interaction Sequence*, 35 Amer. Psychologist 867 (1980).....21

Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance In Sexual Harassment Law*, 26 Harv. Women's L.J. 3 (2003) 22

Einhorn J. Hillel & Robin Hogarth, *Confidence in Judgment: Persistence of the Illusion of Validity*, 85 Psychological Rev. 395 (1978) 21

Robert E. Keeton, Legal Cause In the Law of Torts (1963).....16

Charles G. Lord, Lee Ross & Mark Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol. 2098 (1979).....21

W. Prosser & W. Keeton, The Law of Torts (5th Ed. 1984) 16

Restatement of Agency (Second) § 219(1) (1958) 11

Restatement of Agency (Second) § 228 (1958),... 12, 13

Restatement of Agency (Third) § 7.07(2) (2006) 12, 13

Restatement (Second) of Torts § 431 15

Restatement (Second) of Torts § 442 ..... 15, 17

Restatement (Second) of Torts § 870 15

Restatement of Torts (Third) Apportionment of Liability § 3 (2000) 15

Mark Snyder & William B. Swann, *Hypothesis-testing Processes in Social Interaction*, 36 J. Personality & Soc. Psychol. 1202 (1978) 21

Mark Snyder, *Seek and Ye Shall Find: Testing Hypotheses About Other People*, in Social Cognition: The Ontario Symposium (E. T. Higgins, E. P. Herman, & Mark P. Zanna, eds., 1981) 22

P. C. Wason, *On the Failure to Eliminate Hypotheses in a Conceptual Task*, 12 Quarterly Rev. of Exp. Psychol. 129 (1960) 22

P.C. Wason & P.N. Johnson-Laird, The Psychology Of Reasoning: Structure and Content (1972) 22

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of American Justice (AAJ) respectfully submits this brief as *amicus curiae*.[1]

AAJ, formerly the Association of Trial Lawyers of America, is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions. Among those plaintiffs are persons whose civil rights have been violated by employers who take adverse employment actions because of race, color, religion, sex or national origin. In AAJ's view, freedom from illegal discrimination is fundamental to the enjoyment of all opportunities offered in a free society. Illegal discrimination not only frustrates the individual's right to equal opportunity, it also prevents society from reaping the benefits of the contributions which highly qualified individuals are capable of making. AAJ has the firm conviction that diversity in the work place is essential both for the fulfillment of individual liberty, and to enable society to its true potential.

SUMMARY OF THE ARGUMENT

Restatement of Agency (Third) §2.04 (2006) provides, "An employer is subject to liability for torts committed by employees while acting within the scope of their employment." In *Faragher v. Boca Raton*, 524 U.S. 775 (1998), the Court declined to

---

[1] This brief is filed with the consent of both parties. Their letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

recognize this theory of agency as a basis of imputing liability for sexual harassment, but only because it was unclear whether harassers were acting within the scope of their employment. *Id.* at 793-801. In this case, there is no question that the biased supervisor was the agent of the employer. Whether the supervisor was designated as an agent for the purpose of making personnel decisions is completely irrelevant. It further appears that he was acting within the scope of his employment. The only remaining question concerns causation. In this case, the biased supervisor initiated a process which caused an adverse employment action – but for his involvement there would have been no investigation and no adverse employment action. Applying traditional common law principles, the employer's investigation was entirely foreseeable and not an independent superseding cause sufficient to break the causal chain and defeat employer liability. Liability, if any, should be imputed to BCI for the discriminatory acts of its supervisor.

In this case, the employer's motion for summary judgment was denied. At trial the employer will be able to make all of the factual arguments that it now makes to this Court in an effort to convince a jury that race was not a motivating factor, and that even if it were, it would have still made the same decision. If BCI succeeds in that effort, it will win regardless of imputed liability.

BCI Coca-Cola argues that employers should be able to insulate themselves from liability in virtually all cases of discrimination initiated by non-decisionmakers. It would achieve that goal by establishing internal human resource policies for reporting allegations of discrimination and vesting

final decision making authority in human resource personnel. The rule of law advocated by BCI won't diminish the incidence of discrimination, but will make it virtually impossible to hold most employers accountable for the illegal discrimination in the workplace. Because Title VII does not recognize individual liability, the inability to hold the employer liable results in no liability and no accountability.

According to BCI, their "employment policies embody everything that Congress sought to accomplish in Title VII." BCI Brief, at 20. But if that were true, Congress would never have provided a judicial remedy to enforce the provisions of Title VII. If that were true, Congress would have never created the EEOC to investigate claims of illegal discrimination as a prerequisite for filing suit. If that were true, Congress would have simply required that all employers develop and implement sufficient employment polices, and employ human resources professionals who are trained in equal employment opportunity and who, according to BCI, "unquestionably harbor[] no animus." *Id.* This Court should not indulge in the fiction that corporate human resources personnel are neutral decisionmakers, unaffected by the reports and recommendations of line supervisors and managers. This Court should not allow the fox to guard the chicken coop.

BCI argues nevertheless that employees alleging illegal discrimination must first internally complain about the alleged discriminatory practice and pursue whatever remedies are made available under the employer's anti-discrimination policies. It then argues that the employer's determination that an allegation of discrimination is without merit

absolves it from liability, even if that determination proves to be wrong. According to BCI, the relevant inquiry is not whether the employer's proffered reasons were "wise, fair or correct" but whether they were "honestly believed." BCI Brief at 26. But where a federal agency or the EEOC honestly determines that a complaint of discrimination is without merit, an employee may still thereafter pursue the merits of a claim in federal district court.

Contrary to the implied assertion of BCI, Congress did not intend to give greater weight to a private employer's internal administrative determination than is given to either a federal agency acting as an employer, the EEOC or administrative law judges. Congress never intended to replace the civil justice system with the self-policing efforts of private employers. Congress never intended to require employees to either complain to their employer about discriminatory practices or exhaust corporate administrative remedies as a prerequisite for filing suit. A rule to the contrary would dramatically alter the enforcement mechanism of the statute.

The recognition of employer liability for the discriminatory acts of its agents will create a strong incentive to train managers and scrutinize their conduct to prevent discriminatory practices, thereby fulfilling the prophylactic goals of Title VII. While enlightened corporate human resource policies are to be encouraged, their utilization by employees can never be a substitute for the civil justice system.

BCI argues that the Tenth Circuit's decision requires it to conduct a complete investigation in advance of virtually every adverse employment action involving an employee who falls into a

protected classification. This, they argue, would impose an impossible burden on employers. BCI Brief at 45. Contrary to BCI's representations, even a so-called "rubber stamp" does not automatically result in employer liability. In all cases, an employee must still prove that the protected characteristic is a "motivating factor." In all cases, the employer preserves all remaining defenses and in particular may avoid liability or damages by proving that it would have made the same decision even without consideration of the protected characteristic. In all cases, the basic structure for proving a violation of Title VII remains unchanged.

In order to break the causal chain, an investigation must be an intervening superseding cause. An employer's so-called independent investigation is not a superseding cause of termination from employment, but even it were, an employer investigation must establish that the employer would have taken the same action even without the input from the biased non-decisionmaker. To satisfy this burden, the investigation must determine the truth of the allegations against the employee and establish that they are not pretextual. BCI's investigation was conspicuously deficient to establish either, and liability, if any, should be imputed to BCI.

ARGUMENT

I. A CLEAR RULE WHEN A SUBORDINATE'S BIAS MAY BE IMPUTED TO THE EMPLOYER IS CRUCIAL IN TITLE VII DISCRIMINATION CASES, UNDER EITHER SHIFTING-BURDENS OR MIXED-MOTIVES FRAMEWORK.

Stephen Peters was fired by BCI Coca-Cola Bottling Co. after an altercation with his supervisor regarding week-end work. The supervisor, Mr. Grado, allegedly harbored racial bias against black employees, including Mr. Peters. However, the decision to fire Mr. Peters for insubordination was made by Ms. Edgar, in the company's Human Resources Department, who had no discriminatory motive and acted on Mr. Grado's report of the incident.

The Tenth Circuit, addressing the question of when the discriminatory animus of a subordinate who was not the decisionmaker might be imputed to the employer, ruled:

> To prevail on a subordinate bias claim, a plaintiff must establish more than mere "influence" or "input" in the decisionmaking process. Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action. . . . [A]n employer can avoid [imputed] liability by conducting an independent investigation of the allegations against an employee.

Equal Employment Opportunity Commission v. BCI Coca-Cola Bottling Company of Los Angeles, 450 F.3d 476, 487-88 (10th Cir. 2006). The court found Ms. Edgar's "investigation" was "inadequate, as a matter of law, to defeat the inference that Mr. Grado's racial

bias tainted the decision." *Id.* at 492. Summary judgment was therefore inappropriate. *Id.* at 493.

AAJ suggests that well-settled agency rules and tort principles regarding superseding cause provide a clear rule in subordinate bias cases that serves the purpose of Title VII.

Title VII provides:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e 2(a)(1).

For many years there have been two well-recognized frameworks for analyzing disparate treatment discrimination cases. First is the so-called "pretext" framework with its origins in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). The *McDonnell Douglas* evidentiary framework is a guideline using shifting burdens to assist the court in determining the existence of an illegal motive. The second framework, known as "mixed-motives," was recognized in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1983), and was later codified in the Civil Rights of Act of 1991; 42 U.S.C. § 2000e-2(m).[2]

---

[2] The Civil Rights Act of 1991 did not amend the ADEA. Even though both statutes provide for a violation of the statute where an adverse action is taken "because of" the protected

The mixed-motive model does not utilize shifting burdens, but instead focuses more directly on proving that a protected characteristic was a motivating or substantial factor in the decision making process. Under a mixed-motive analysis Plaintiff does not have to prove pretext. *See Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1067 (9th Cir. 2003) ("In mixed motive cases, . . . it does not make sense to ask if the employer's stated reason for terminating an employee is a pretext for retaliation, when the employer has offered more than one reason for the action that it took. Rather, the relevant inquiry in a 'mixed motive' case is distinct from that of a 'single motive' or pretext case"). If Plaintiff establishes that the illegal reason was a motivating factor, the burden then shifts to the employer to prove as an affirmative defense that it would have made the same decision even without consideration of the protected characteristic. 42 U.S.C. § 2000e 5(g)(2)(B).

---

classification, a number of circuits have held that the mixed motive standard of the 1991 Act does not apply to cases under the ADEA. *See Lewis v. Young Men's Christian Ass'n*, 208 F.3d 1303, 1305 (11th Cir. 2000); *Watson v. Southern Pennsylvania Transportation Authority*, 207 F.3d 207, 215 (3rd Cir. 2000); *Equal Employment Opportunity Commission v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 163 n.1 (4th Cir. 2004) ("We have previously assumed, without deciding, that direct evidence is still a prerequisite for a mixed-motive analysis in ADEA cases. [citing cases] We are not called on to decide that issue because the EEOC has presented direct evidence of discrimination."). *But see Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004) (deciding that the standards established by the Court in *Desert Palace* and by the Civil Rights Act of 1991 apply to the ADEA); *Hillstrom v. Best Western TLC Hotel*, 354 F.3d 27, 31 (1st Cir. 2003) (deciding whether "the real reason, at least in part, was age and gender discrimination").

In *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003), this Court rejected the distinction between direct and circumstantial evidence and ruled that, to obtain a mixed-motive instruction under § 2000e 2(m), "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'" 539 U.S. at 101. Numerous lower courts have applied this same reasoning to summary judgment rulings.[3]

The Tenth Circuit decided this case using the *McDonnell Douglas* shifting-burden model. But the mixed-motive model is used by many lower courts in many cases. The Court should take care not to endorse one model at the expense of the other.

Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b). Individuals, however,

---

[3] *See McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004) ("[W]hen responding to a summary judgment motion, the plaintiff is presented with a choice regarding how to establish his or her case. [Plaintiff] may proceed by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the employer]"); *But see Griffith v. City of Des Moines*, 387 F.3d 733, 735 (8th Cir. 2004) ("*Desert Palace*, a decision in which the Supreme Court decided only a mixed motive jury instruction issue, is an inherently unreliable basis for district courts to begin ignoring this Circuit's controlling summary judgment precedents"); *Wright v. Murray Guard Inc.*, 455 F.3d 702, 716 (6th Cir. 2006) (Moore, J., concurring) (collecting cases).

are not liable for damages under Title VII.[4] As a consequence, if liability is not imputed to the employer, there is no liability or accountability at all.

II. AGENCY THEORY SUPPORTS IMPUTING LIABILITY WHERE THE BIASED EMPLOYEE WAS THE CAUSE OF THE TERMINATION WITHOUT ANY INTERVENING SUPERSEDING CAUSE.

According to BCI, when an employer institutes effective policies designed to root out animus among

---

[4] *See Miller v. Maxwell's Intern. Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) ("If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees"); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995) ("We now hold that individual defendants with supervisory control over a plaintiff may not be held personally liable under Title VII"); *E.E.O.C. v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995) ("individuals who do not otherwise meet the statutory definition of 'employer' cannot be held liable under the ADA"); *Lenhardt v. Basic Institute of Tech. Inc.*, 55 F.3d 377, 381 (8th Cir. 1995) (supervisors and managers not subject to individual liability); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir.), *cert. denied*, (1995) (Title VII does not impose individual liability on supervisory employees); *Smith v. Lomax*, 45 F.3d 402, 403 (11th Cir. 1995) (employees cannot be held liable under the ADEA or Title VII); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir. 1994) (Title VII does not permit imposition of liability upon an individual unless they meet Title VII's definition of employer); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) (under Title VII, suits must proceed against individuals in their official capacities only; individual capacity suits are inappropriate); *Wathen v. General Electric Company*, 115 F.3d 400, 405 (6th Cir. 1997) ("an individual employee/supervisor, who does not otherwise qualify as an 'employer,' may not be held personally liable under Title VII").

non-decisionmaking subordinates, those subordinates are not the employer's agents whose discriminatory bias may be imputed to the employer. BCI Brief at 16. Thus, BCI argues, an employer is liable for the acts of non-decisionmakers only if it knew or should have known of the subordinates' discriminatory animus, and the protected trait was a determinative influence in the adverse action. BCI Brief at 29. BCI is wrong.[5]

A. The Biased Supervisor Was Acting Within the Scope of Employment.

In *Faragher v. Boca Raton*, 524 U.S. 775 (1998), the Court considered the agency theory to be applied for imputing liability to the employer in cases involving sexual harassment. In discussing the Restatement of Agency (Second) § 219(1) (1958), the Court acknowledged that a "master is subject to liability for the torts of his servants committed while acting in the scope of their employment." 524 U.S. at 793. The Court declined to apply that theory of agency, but only because it was unclear whether a harasser was acting within the scope of employment or a frolic. Listing examples, the Court clearly

---

[5] BCI and its *amici* rely upon *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000), for the proposition that Plaintiff must prove that race played a "determinative influence" in the outcome. But *Reeves* was decided under the ADEA, which was not included in the amendments to the Civil Rights Act of 1991. Moreover, this heightened showing is at odds with this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which simply required that plaintiff establish that a protected characteristic was a "substantial factor" in the decisionmaking process, even though other factors also motivated the practice. 490 U.S. at 258-59 (White, J., concurring). Justice White's opinion is controlling for cases not decided under the Civil Rights Act of 1991.

indicated that types of discrimination other than harassment were within the "scope of employment" theory. *Id.* at 793-801. Also relying upon the Restatement of Agency (Second) § 228(1) (1958), the Court in *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999) acknowledged,

> [E]ven intentional torts are within the scope of an agent's employment if the conduct is "the kind [the employee] is employed to perform," "occurs substantially within the authorized time and space limits," and "is actuated at least in part, by a purpose to serve the" employer.

Id. at 543-544. An employee who satisfies these rules is acting within the scope of employment "even if the employee engages in acts 'specifically forbidden' by the employer and uses 'forbidden means of accomplishing results.'" *Id.*[6]

The Restatement of Agency (Third) § 7.07(2) (2006) addresses when an employee is acting within the scope of employment for the purpose of vicarious liability somewhat differently:

> An employer acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct

---

[6] While the Court in *Kolstad* declined to apply the Restatement rule to impute liability for punitive damages, the issue before the Court now involves only compensatory damages. Applying this rule within the context of compensatory damages would not diminish the incentive to implement anti-discrimination programs, just to the contrary. *See infra* at 22-24.

> not intended by the employee to serve any purpose of the employer.[7]

In this case, the biased supervisor was acting within the scope of employment. The employer delegated to the biased supervisor the authority to report insubordination to human resources, which is exactly what he did. The biased supervisor was the agent of the employer and at all times was acting within the employer's control. Whether the agent was specifically designated to make personnel decisions is irrelevant if the agent was acting within the scope of employment and his conduct "caused" the harm to Plaintiff. An employer is responsible for the wrongful acts of all its employees, not only those in personnel.

Like harassment, disparate treatment discrimination is a persistent problem in the workplace. As this Court has recognized,

> An employer can, in a general sense, reasonably anticipate the possibility of such conduct occurring in its workplace, and one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim. . . . developments like this occur from time to time in the law of agency.

Faragher, 524 U.S. at 798.

---

[7] This section of the Restatement of Agency (Third) differs with the Restatement Second because it is phrased in more general terms. Under Restatement Second § 228(1)(c), conduct is not within the scope of employment unless "it is actuated, at least in part, by a purpose to serve" the employer. The Restatement of Agency (Third) exempts only that "conduct intended to serve no purpose of the employer." *See* Restatement of Agency (Third), Section 7.07 comment b (2006).

The Court in *Faragher* declined to impose this burden on the employer, but only because "there is no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope and acts amounting to what the older law called frolics or detours from the course of employment." *Id.* But this case does not involve harassment, and the biased supervisor was acting within the scope of employment and not acting on a frolic or detour. The discriminatory behavior of the non-decisionmaking supervisor is easily anticipated, and should be charged to BCI as one of the costs of doing business.[8]

B. The Employer's Investigation is Not a Superseding Cause Sufficient to Break the Causal Chain.

BCI argues that the employer should be liable where one link in the chain is infected by bias,

---

[8] In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court recognized vicarious liability where the actions of the supervisor "culminates" in tangible employment action. 524 U.S. at 765. In *Ellerth*, the Court recognized that supervisors without final decisionmaking authority would "cause" tangible employment action by officials higher in the decisionmaking process. "The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. . . . The supervisor often must obtain the imprimatur of the enterprise, and use its internal processes." 524 U.S. at 762, *citing Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (noting that the supervisor did not fire plaintiff; rather, the Career Path Committee did, but the employer was still liable because the Committee functioned as the supervisor's 'cat's-paw'); *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59, 62 (2nd Cir. 1992) ("From the perspective of the employee, the supervisor and the employer merge into a single entity"). As applied to non-harassment discrimination, however, all cases necessarily culminate in tangible employment action.

unless the causal chain is broken by an independent investigation. BCI Brief at 44. Whether a causal chain can be broken by a so-called independent investigation is determined by traditional principles of common law tort.

The traditional tort principles for determining when an intervening event rises to the level of a superseding cause are couched in the language of negligence, but apply to intentional torts as well. *See Springer v. Seaman*, 821 F.2d 871, 877 (1st Cir. 1987) (citing Restatement (Second) of Torts § 870 cmt. l, and § 431 cmt. d). The Restatement of Agency (Second) lists six considerations to determine the existence of a superseding cause.[9] Every one of the considerations listed in the Restatement militates against treating an employer's personnel

---

[9] "The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another: (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence; (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation; c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation; (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act; (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him; (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion." Restatement (Second) of Torts § 442. The issue of superseding cause is not address in the Restatement of Torts (Third). *See* Restatement of Torts (Third) Apportionment of Liability § 3 cmt. c (2000).

investigation for discipline as a superseding intervening cause. In particular, "[t]he courts are quite generally agreed that [foreseeable] intervening causes . . . will not supersede the defendant's responsibility." W. Prosser & W. Keeton, The Law of Torts § 44, at 303 04 (5th Ed. 1984). *See also Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) ("The doctrine of superseding cause is . . . applied where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a later cause of independent origin that was not foreseeable"); *Farr v. NC Machinery Co.*, 186 F.3d 1165, 1169 (9th Cir. 1999) ("the doctrine of superseding intervening cause is at bottom an expression of the requirement of foreseeability") (citing Robert E. Keeton, Legal Cause In the Law of Torts 38-41 (1963)).

In *Springer v. Seaman*, 821 F.2d 871 (1st Cir. 1987), an independent contract postal carrier alleged that the U.S. Post Office terminated his contract as the result of an investigation instigated by third parties who were racially motivated. *Id.* at 873. The district court granted the defendants' motion for summary judgment because it concluded that the third parties' actions were not the proximate cause of the Plaintiff's contract termination. The Court of Appeals reversed.

The Court of Appeals held that generally proximate causation was a question of fact for the jury. The Court concluded that "traditional tort rules determine when an intervening cause rises to the level of a superseding cause, destroying proximate causation by the primary act and thus relieving the defendant of liability." *Id.* at 877. The Court relied

upon the six factors set forth in the Restatement of Torts (Second) § 442 and concluded that the defendants "have not shown that the investigation and termination decision were sufficiently independent of the individual defendants' discriminatory actions to constitute superseding causes under the Restatement as a matter of law." *Id.* at 879.[10]

The Tenth Circuit did not apply the "scope of employment" theory of agency. It did not analyze whether BCI's investigation could be an independent superseding cause of Plaintiff's termination from employment. If it had, it could not have concluded that "an employer can avoid liability by conducting an independent investigation of the allegations against the employee." 450 F.3d at 488.

---

[10] Applying the Restatement considerations to this case, a) the employer's investigation did not bring about a harm different in kind from that which would otherwise have resulted from the supervisor's conduct. The supervisor's conduct was intended to result in disciplinary action against the employee, which is exactly what happened; b) The employer's investigation and subsequent termination was absolutely normal, as opposed to extraordinary in view of the circumstances existing at the time of its operation; c) The investigation is not independent of the supervisor's conduct, but is the normal result of his report to human resources; d) The employer's investigation is not the result of a third person's act; the supervisor and the human resources representative conducting the investigation work for the same employer; e) the employer's investigation is not in and of itself wrongful and would not otherwise subject the employer to liability; and f) the supervisor was motivated by race in reporting the employee to human resources - the culpability is high.

III. TITLE VII REQUIRES THE EXHAUSTION OF ADMINISTRATIVE REMEDIES PRIOR TO SUIT.

To bring a Title VII cause of action against a federal agency in district court, an employee must first exhaust all administrative remedies. 42 U.S.C. § 2000e 16(c); *Brown v. General Services Administration*, 425 U.S. 820, 832 (1976). A plaintiff must comply with regulatory and judicially imposed exhaustion requirements, including the requirement to pursue the administrative claim "with diligence and in good faith." *Vinieratos v. United States Air Force*, 939 F.2d 762, 771 (9th Cir.1991).[11] Thereafter, an aggrieved employee may file suit in district court.[12]

---

[11] The employee "must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory," 29 C.F.R. § 1614.105(a)(1). The EEO officer then conducts an investigation and comes to a conclusion. The employee can then file an appeal to the EEOC and thereafter proceed to federal court, without the obligation to present evidence to an ALJ in order to exhaust his or her administrative remedies. *See* 42 U. S. C. § 2000e-16(c); 29 C.F.R §§1614.401, 1614.407.

[12] "Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint . . . may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant." 42 U.S.C. § 2000e-16(c) Even a decision by an administrative law judge is not binding upon an employee, who may appeal that decision to either the EEOC or district court. 29 C.F.R. § 1614.110(a).

A Title VII plaintiff employed in the private sector must file an administrative charge with the EEOC within 180 or 300 days of the last act of discrimination. 42 U.S.C. § 2000e 5(e)(1). If, after investigating, the EEOC finds reasonable cause to believe the charges are true, it undertakes to eliminate the disputed employment practice "by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e 5(b). If the EEOC finds no reasonable cause or if conciliation is unsuccessful, the employee must obtain a right to sue notice, and then file suit within 90 days. See 42 U.S.C. § 2000e 5(f)(1).

BCI argues that its own personnel policies and efforts at self-policing discrimination should supersede the administrative process created by Congress and that, unlike the congressionally mandated administrative process, its own administrative process would be binding on the employee. But Congress did not intend a corporate human resources policy to substitute for either the EEOC or the civil justice system.

IV. CORPORATE EMPLOYMENT POLICIES ARE NOT A SUBSTITUTE FOR THE ADMINISTRATIVE PROCESS OR JUDICIAL ENFORCEMENT OF TITLE VII.

BCI argues that it is the "model of equal employment opportunity" because it has established policies to encourage discrimination complaints and employs highly trained human resources personnel to oversee the process. According to BCI, "[t]he relevant inquiry is whether the employer has established an effective policy for reporting allegations of discrimination and has any reason to

suspect that animus infected the relevant decision. The employer is not liable if, despite its best efforts, it has no reason to believe that some other employee without decisionmaking authority has infected the employment decision with racial bias." BCI Brief at 15-16. According to BCI, "the relevant inquiry is not whether BCI's proffered reasons were 'wise, fair or correct' but whether BCI "honestly believed those reasons and acted in good faith upon those beliefs." BCI Brief at 26.

In effect, BCI argues that the determination by corporate human resources personnel should be sufficient to insulate it from liability – even if the determination of no discrimination is wrong. But as explained above, even a "no cause" finding by the EEOC is not binding, and the employee may litigate the merits of the discrimination claim de novo in federal district court. It is extraordinarily unlikely that Congress intended the judgment of corporate human resources personnel to carry greater weight than the EEOC or even Administrative Law Judges.[13]

---

[13] In the world according to BCI, an employee who is dissatisfied with the employer's "independent" investigation and its determination of "no discrimination" could still file a charge of discrimination with the EEOC. In the employer's response to the EEOC, the employer would argue that the alleged discriminatory supervisor was not the final decisionmaker, and that the employer did an independent investigation sufficient to break the causal chain. If the EEOC confirmed these facts, its investigation would be concluded without ever reaching the merits of the discrimination claim. After having received a right to sue notice, the employee could then file a Complaint in district court. In a summary judgment motion, the employer would make the same arguments that were made at the administrative level, and if confirmed the

Much like a police department's internal investigation of an excessive force complaint, an employer's human resources personnel are not unbiased decisionmakers. It would be nothing less than folly to assume the neutrality of an employer's "independent" investigation, and would be even greater folly to accord its decision binding effect. Cognitive social psychology teaches that once a recommendation has been made, it will tend to function as a prior theory – a tentative hypothesis. As such, it can reasonably be expected to influence the ultimate decisionmaker's judgment in a recommendation-consistent direction, even if the employer conducts its own investigation. This tendency is known as expectancy confirmation bias. The empirical and theoretical literature on expectancy confirmation bias is vast.[14] Moreover,

---

case would be dismissed with prejudice and again without ever reaching the merits. In the world according to BCI, its judgment about the merits of an employee's discrimination claim is in effect res judicata.

[14] See Charles G. Lord, Lee Ross & Mark Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol. 2098 (1979); Einhorn J. Hillel & Robin Hogarth, *Confidence in Judgment: Persistence of the Illusion of Validity*, 85 Psychological Rev. 395 (1978); Mark Snyder & William B. Swann, *Hypothesis-testing Processes in Social Interaction*, 36 J. Personality & Soc. Psychol. 1202 (1978); John M. Darley & Paget Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. Personality & Soc. Psychol. 20 (1983)(demonstrating how expectancy confirmation bias leads to the reinforcement of social stereotypes); John M. Darley & Russell H. Fazio, *Expectancy Confirmation Processes Arising in the Social Interaction Sequence*, 35 Amer. Psychologist 867 (1980)(same) Mark Snyder, *Seek and Ye Shall Find: Testing Hypotheses About Other People*, in Social Cognition: The Ontario Symposium 277 (E. T. Higgins, E. P.

many legal scholars seriously question whether employer anti-discrimination policies are effective in preventing discrimination. *E.g.* Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 Berkeley J. of Employment and Labor Law 1 (2001); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance In Sexual Harassment Law*, 26 Harv. Women's L.J. 3 (2003).

Congress created a comprehensive administrative process which employees are required to initiate and exhaust as a prerequisite for filing suit under Title VII. BCI would have this Court require the exhaustion of corporate administrative remedies as a substitute for administrative remedies required by the EEOC, which would then insulate the employer from liability even where its decision was wrong. If any employer investigation is sufficient to break the causal chain and insulate the employer from liability, then the employer will invariably conduct whatever investigation is required to achieve that end. The employee will then be denied the opportunity to litigate the merits of his claim in district court. Congress never intended employer internal processes to replace the civil justice system.

Herman, & Mark P. Zanna, eds., 1981)(review of literature on hypothesis-confirming strategies); P.C. Wason & P.N. Johnson-Laird, The Psychology Of Reasoning: Structure and Content (1972); P. C. Wason, *On the Failure to Eliminate Hypotheses in a Conceptual Task*, 12 Quarterly Rev. of Exp. Psychol. 129 (1960).

A. Employers Have a Strong Incentive to Implement Anti-Discrimination Policies.

BCI vehemently argues that Congress intended the provisions of Title VII be prophylactic, and that employers should have an incentive to adopt and implement corporate policies to root out discrimination in the work place. Those incentives already exist, and additional incentives are not needed.

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Court established a two prong affirmative defense to defeat vicarious liability: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." 524 U.S. at 765. But it is clear that "[n]o affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.* In only those cases which do not culminate in tangible employment action, a successful affirmative defense requires an employer to create sufficient policies and practices to prevent and correct sexually harassing behavior. *E.g., Holly D. v. California Institute of Technology*, 339 F.3d 1158, 1177 (9th Cir. 2003)(reasonable care to prevent sexual harassment where employer promulgated a written policy which defined prohibited behavior, identified contact personnel, and established procedures to investigate and resolve any claims, made policy available in several publications, and conducted periodic training on sexual harassment).

In *Kolstad v. American Dental Ass'n*, the Court established a three part inquiry to address when the evidence supports a punitive damages verdict. 527 U.S. at 530. The Court reaffirmed that the employee must demonstrate that "the respondent engaged in a discriminatory practice or practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual," but rejected the argument that the heightened standard requires that an employer's behavior be "egregious." *Kolstad*, 527 U.S. at 534 35. The Court also held that, "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'" *Id.* at 545. This good faith defense to punitive damages requires that the employer adopt and implement anti-discrimination policies. *E.g. Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1210 (10th Cir. 2000) ("[T]o avail itself of *Kolstad's* good-faith compliance standard, an employer must at least adopt anti-discrimination policies[,] make a good faith effort to educate its employees about these policies, and 'make good efforts to enforce' the policy").

BCI argues that allowing liability to be premised upon a discriminatory motive of a non-decisionmaker who infects the decisionmaking process will create a disincentive for employers to maintain a centralized decisionmaking process as a preventative measure. BCI Brief at 47. To the contrary, imputing employer liability for the acts of its agents will create an even stronger incentive to train managers and scrutinize them to prevent discriminatory practices. Moreover, there is no reason to believe that employers will ignore the

strong incentives which already exist if the Court declines BCI's invitation to subordinate the EEOC administrative process and the civil justice system to corporate human resource anti-discrimination policies.

B. A Title VII Plaintiff is Not Required to Complain About Discrimination to Corporate Human Resources.

The second prong of the *Ellerth* affirmative defense generally requires a victim of harassment to complain to corporate management. *Ellerth*, 524 U.S. at 765. Harassment, however, is distinguishable from other forms of discrimination.

Victims of harassment necessarily know they are being harassed, and the expectation that they should complain seems reasonable. Employees who are subject to adverse employment actions, however, may not be aware that they are victims of illegal discrimination. Often a review of a co-worker's personnel files is required to demonstrate that an employee is being treated differently from those not within a protected classification. *E.g., Barnes v. St. Catherine's Hospital*, 563 F.2d 324, 327 (7th Cir. 1977) ("The plaintiff compiled a statistical compilation drawn from the personnel files of employees discharged by the hospital in an attempt to demonstrate that white employees were consistently given more written warnings and were permitted more infractions of the hospital rules prior to any suspension or termination against them"). Access to the personnel files of co-workers is routinely and understandably denied to employees. Access to other information exclusively in the possession of the employer may be necessary to establish a statistical disparity or pattern and

practice of discrimination. *E.g., Obrey v. Johnson*, 400 F.3d 691, 694 (9th Cir. 2005) ("In a case in which the plaintiff has alleged that his employer has engaged in a 'pattern or practice' of discrimination, "[s]tatistical data is relevant because it can be used to establish a general discriminatory pattern in an employer's hiring or promotion practices. Such a discriminatory pattern is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue"). Often this information is only uncovered in litigation during the process of formal discovery, and almost always over the vigorous objections of the employer. Because many employees may be unaware that their treatment is based upon a discriminatory motive or unaware how to prove it, it would be unreasonable to expect them to complain before the adverse action or "within a reasonable time thereafter."

BCI would apparently require that the employee complain about discrimination prior to the adverse action or "within a reasonable time thereafter." BCI Brief, at 17. Employees are apparently left to guess at what constitutes "a reasonable time thereafter." This issue is more than academic because in effect this requirement would create a new statute of limitations which would be dramatically shorter than anything contemplated by Congress.

V. THE ALLEGED BURDEN ON EMPLOYERS IS VASTLY OVERSTATED.

A. The Defendant Preserves All Defenses Regardless of Imputed Liability.

Defendant and *amici* in support mischaracterize the Tenth's Circuit's ruling. BCI argues that the court "held that liability attaches merely upon a showing of a causal relationship between any employee's biased conduct and an employment decision." BCI Brief at 18. The Advisory Council argues that "under Tenth Circuit's analysis, if a plaintiff alleges discrimination resulting from the bias of a subordinate, non-decionmaking employee, liability will attach unless the employer can demonstrate that it conducted an 'independent' investigation which confirmed its decision was not caused by the alleged underlying bias." Advisory Council Brief at 9-10. The Advisory Council further argues that the burden of proof shifts to the employer to refute discrimination without the necessity of Plaintiff proving pretext, and that this model would be a fundamental deviation from the principles established by this Court in *McDonnell Douglas*. *Id*. But this is incorrect.

The only issue before the Court concerns the viability of the so called innocent decisionmaker defense, and under what circumstances it applies to foreclose the employer's financial responsibility for the acts of its agents. The failure to prevail under this affirmative defense does not automatically result in employer liability and does not waive any traditional defenses otherwise available to the employer. It does not obviate the employee's obligation under *McDonnell Douglas* to prove a prima facie case and then subsequently to prove pretext. Under the mixed-motive analysis, it does not obviate the necessity to prove that a protected classification was a motivating factor.

On remand BCI will have the opportunity to persuade the jury that race was not a motivating factor or that it would have taken the same action even without consideration of race.

B. An Adequate Investigation Must Determine the Truth of the Allegations and That They Are Not Pretextual.

It should be emphasized that no investigation is adequate to break the causal chain unless it constitutes an intervening and superseding cause. The Tenth Circuit erroneously ruled, however, that in order to avoid imputed liability the employer must prove that it conducted an independent investigation which demonstrates that it would have made the same decision even without the input from the biased non-decisionmaker. The Court then ruled that "[i]ndeed, under our precedent, simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory." 450 F.3d at 488. Unbelievably, BCI argues that even the minimal effort of interviewing the employee would be excessive.

To achieve the intended purpose, at a minimum any employer investigation must seek to determine the truth of the allegations against the employee and that they are not pretextual. Such an investigation will require considerably more than asking the employee for his version of events. It may require interviewing witnesses identified by the employee or others and reviewing documents to determine the possible existence of disparate treatment. Often whether the employer has satisfied this burden will be a question of fact for the jury. In this case, the bare bones investigation conducted by BCI does not satisfy this standard as a matter of law.

BCI argues that setting minimum standards for investigations ignores the realities of day-to-day human resources administration, that administrators in each corporation should have discretion to determine what type of investigation is appropriate, and that courts must not be "super personnel departments." BCI Brief at 46. But this Court has already required that human resources departments exercise "reasonable care" to prevent and protect against illegal harassment. Requiring that they exercise "reasonable care" to assure the truth of the allegations against an employee and that they are not pretextual intrudes no more into the employer's personnel functions than the Court has already done in *Ellerth*.

C. An Adequate Investigation Does Not Impose An Undue Burden On Employers.

BCI argues that the requirement of some investigation to break the causal chain would result in an extraordinary burden – particularly for large employers involving all adverse actions such as raises, demotions, promotions, suspensions. Brief at 18, 45. But BCI dramatically overstates its burden.

Under this theory, if the employer seeks to preserve the so called innocent decisionmaker defense, it must prove that they would have made the same decision without the input of the biased supervisor before the adverse action becoming final. Logically, this would be an affirmative defense just like the affirmative defense to damages under Title VII. See 42 U.S.C. § 2000e 5(g)(2)(B). But even if the employer decides to rubber stamp, it can still avoid damages by proving after the adverse action that it would have made the same decision even without consideration of the protected characteristic. *Id.* In

both cases, the factual analysis remains essentially the same, only the timing differs. The issue for the employer, therefore, is not what it has to prove, but when it has to prove it.

Employer liability should be imputed where a biased non-decisionmaker acting within the scope of employment has caused an adverse employment action without any intervening and superseding cause. The minimal investigation conducted by BCI was not sufficient to break the causal chain initiated by a biased supervisor. Congress did not intend to replace the civil justice system with an employer's human resource policies.

CONCLUSION

For the above reasons, the decision of the court of appeals below should be affirmed.

Respectfully submitted,

Jeffrey L. Needle
Law Office of Jeffrey Needle
119 1st Ave. South - Suite #200
Seattle, WA 98104
(206) 447-1560
Attorney for Amicus Curiae

March 27, 2007

617

FILED
FEB 20 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-341

IN THE

Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

GLEN D. NAGER
Counsel of Record
VICTORIA DORFMAN
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939

SAMUEL ESTREICHER
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. FOR AN EMPLOYER TO BE HELD LIABLE UNDER TITLE VII, A PLAINTIFF MUST ESTABLISH BOTH THAT UNLAWFUL MOTIVATION CAUSED AN ADVERSE EMPLOYMENT ACTION AND THAT THE EMPLOYER IS LEGALLY RESPONSIBLE FOR THAT DISCRIMINATORY MOTIVATION UNDER APPLICABLE AGENCY LAW PRINCIPLES 6

A. The Plaintiff Must Show That Unlawful Motivation Was Both A But-For And Proximate Cause Of The Adverse Employment Action 7

B. The Plaintiff Must Show That, Under Applicable Agency Law Principles, The Employer Is Legally Responsible For The Discriminatory Motivation That Caused An Adverse Employment Action 11

II. THE TENTH CIRCUIT'S DECISION IS INCORRECT BECAUSE IT ATTEMPTED ONLY THE FACTUAL CAUSATION PART OF THE INQUIRY AND DISREGARDED THE AGENCY LAW INQUIRY 21

CONCLUSION 27

TABLE OF AUTHORITIES

Page

Federal Cases

Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991 (2006).....8
Armstrong v. Turner Indus., Inc., 141 F.3d 554 (5th Cir. 1998).....9
Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983)..... 8-9
Blue Shield v. McCready, 457 U.S. 465 (1982).....9
Booker v. GTE.net LLC, 350 F.3d 515 (6th Cir. 2003).....19
Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).....*passim*
Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006).....1
Domino's Pizza, LLC v. McDonald, 546 U.S. 470 (2006).....1
Faragher v. City of Boca Raton, 524 U.S. 775 (1998).....*passim*
Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982) 11-12
Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).....9
Hamilton v. Rodgers, 791 F.2d 439 (5th Cir. 1986), *abrogated on other grounds by Harvey v. Blake*, 913 F.2d 226 (5th Cir. 1990).....9
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).....9
Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277 (4th Cir. 2004), *cert. dismissed*, 543 U.S. 1132 (2005).....19
Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992).....8
Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989).....11
Jones v. Baisch, 40 F.3d 252 (8th Cir. 1994).....19

TABLE OF AUTHORITIES
(continued)

Page

Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999).....1, 4, 10, 15, 16, 19
Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59 (2d Cir. 1992).....18
Long v. Eastfield Coll., 88 F.3d 300 (5th Cir. 1996)....10, 22
Malley v. Briggs, 475 U.S. 335 (1986).....7
Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).....12, 14, 24
Monnell v. Dep't of Social Servs., 436 U.S. 658 (1978).....11
Muegge v. Heritage Oaks Golf & Country Club, Inc., No. 06-12850, 2006 WL 3591957 (11th Cir. Dec. 12, 2006).....18
NLRB v. Schroeder, 726 F.2d 967 (3d Cir. 1984).....20
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)...7, 9, 20
Reeves v Sanderson Plumbing Prods., 530 U.S. 133 (2000).....9, 24
Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990).....10, 18, 22
Shick v. Ill. Dep't of Human Servs., 307 F.3d 605 (7th Cir. 2002).....9
Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).....8
Willis v. Marion County Auditor's Office, 118 F.3d 542 (7th Cir. 1997).....10, 22
Wilson v. Stroh Cos., 952 F.2d 942 (6th Cir. 1992).....10, 22

TABLE OF AUTHORITIES
(continued)

Page

State Cases

Groob v. Keybank, 843 N.E.2d 1170 (Ohio 2006) 14
Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. 1928) 7, 9
Salinas v. Genesys Health Sys., 688 N.W.2d 112 (Mich. Ct. App. 2004) 14
Zsigo v. Hurley Med. Ctr., 716 N.W.2d 220 (Mich. 2006) 14

Docketed Cases

Ledbetter v. Goodyear Tire & Rubber Co., No. 05-1074, 126 S. Ct. 2965 (June 26, 2006) 1

Statutes & Rules

15 U.S.C. § 15 9
18 U.S.C. § 1962(c) 8
42 U.S.C. § 1981 11
42 U.S.C. § 1983 ..... 7, 11
42 U.S.C. § 2000e(b) ..... *passim*
42 U.S.C. § 2000e-2(a)(1) ..... *passim*
S. Ct. R. 37.3 1
S. Ct. R. 37.6 1

Other Authorities

57A Am. Jur. 2d Negligence § 435 (2006) 7
57A Am. Jur. 2d Negligence § 466 (2006) 7
57A Am. Jur. 2d Negligence § 561 (2006) 8
Restatement (Second) of Agency § 215-216 (1958) 12

TABLE OF AUTHORITIES
(continued)

Page

RESTATEMENT (SECOND) OF AGENCY § 217(C) (1958)..... 15
RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958)..... 3, 12, 13, 18, 24
RESTATEMENT (SECOND) OF AGENCY § 229(1) (1958)..... 13, 14
RESTATEMENT (SECOND) OF TORTS §§ 430-431 (1965)..... 7
WILLIAM L. KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 41 (5th ed. 1984)..... 8

Amicus curiae respectfully submits this brief in support of Petitioner pursuant to Supreme Court Rule 37.3.[1] *Amicus* urges the Court to reverse in pertinent part the judgment of the United States Court of Appeals for the Tenth Circuit.

STATEMENT OF INTEREST

Amicus curiae, the Chamber of Commerce of the United States of America (the "Chamber"), is a nonprofit corporation organized and existing under the laws of the District of Columbia. The Chamber is the world's largest federation of business, trade and professional organizations in the United States. The Chamber represents over three million businesses and organizations. The Chamber has members of every size, in every sector and in every region of the United States.

A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community. The Chamber has regularly participated as *amicus curiae* in cases before this Court addressing employment law issues, including, most recently, in *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074, 126 S. Ct. 2965 (June 26, 2006) (cert. granted); *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006), *Domino's Pizza, LLC v. McDonald*, 546 U.S. 470 (2006), as well as in cases directly relevant to the issues presented here, *see, e.g., Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amicus curiae*, and their consent letters are on file with the Clerk's Office.

The Chamber's members have a substantial interest in the issues that this case presents regarding the proper standards for imposing vicarious liability under Title VII of the Civil Rights Act of 1964. This case presents this Court with the opportunity to decide whether and when an employer is subject to vicarious liability for unapproved, biased acts of a renegade employee. The plaintiff in this case seeks to establish a strict liability regime that would penalize employers for any acts by employees in the workplace that arguably have a factual connection to an adverse employment action. But employers are not social insurers and should not be held liable for every frolic and detour of their employees. Rather, as the Chamber explains below, the Court should apply principles of causation law and agency law so that employers are held liable only for discriminatory exercises of delegated authority that factually cause an adverse employment action and that could have been prevented by reasonable anti-discrimination policies and procedures.

SUMMARY OF ARGUMENT

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides that "an employer" may not "discharge any individual . . . because of such individual's race, color, religion, sex, or national origin." Title VII further provides that an "employer" is "a person engaged in an industry affecting commerce . . . and any agent of such a person." *Id.* § 2000e(b). The question in this case is whether "any agent" of petitioner "discharge[d]" the plaintiff "because of such individual's race . . . ." The court below oversimplified the issues raised by this question and did not analyze them correctly.

I. This Court's jurisprudence establishes that, to hold an employer vicariously liable for an allegedly biased act of one of its employees, the plaintiff must show both (1) that the allegedly biased act caused the adverse employment action

and (2) that the employer is legally responsible for the act under agency law principles applicable in Title VII cases.

A. Consistent with common-law causation principles, to establish causation in a Title VII case, a plaintiff must show that the unlawful bias of the employee was both the but-for and proximate cause of the ultimate adverse employment decision. But-for cause is factual causation; proximate cause is legal causation. This Court has recognized the applicability of both of these causation concepts in a variety of statutory contexts. The Court has expressly recognized but-for causation in Title VII cases; and, while it has not as explicitly discussed proximate cause concepts in a Title VII case, it has implicitly recognized the concept and courts of appeals have explicitly required proximate causation in the Title VII context. In this regard, the courts of appeals have held that effective anti-discrimination policies and procedures, such as investigations, may negate proximate cause. The Court should so hold as well.

B. It is also well-established that causation alone is insufficient to impose vicarious liability on an employer. Employers are not liable for all frolics and detours of their employees. Rather, a legal rule allowing imposition of agency-based liability in a particular context is required. Thus, even where an adverse action is caused by race, the employer is only responsible if that action and the motivation that is said to have caused it may properly be imputed to the employer.

To properly impute vicarious liability, a plaintiff must show that the agency law principles contemplated by Title VII allow holding the employer liable for bias of an employee. At common law, an employer could be held vicariously liable for torts of an employee where the employee was "aided in accomplishing the tort by the existence of the agency relation." RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). But this Court has made clear that this "aided by the existence of the agency relation"

standard cannot be applied literally in the Title VII context, because it would subject employers to overly broad liability and would undermine employer incentives to promote compliance with Title VII. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775, 797 (1998); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544 (1999).

Rather, the Court's cases suggest that imposition of vicarious liability on an employer in the Title VII context is appropriate only where the plaintiff proves that the allegedly biased actions involved the exercise of official delegated authority and thus properly can be attributed to the employer as official or company acts. *See Burlington*, 524 U.S. at 762; *Faragher*, 524 U.S. at 805; *Kolstad*, 527 U.S. at 545. An official act is certainly committed by a biased employee when he effectively makes the final decision that constitutes the adverse action for which the plaintiff sues his employer. In such circumstances, the biased employee is acting on delegated decision-making authority, and the biased decision is effectively ratified and adopted by the final decision-maker and the employer as their own. Because the decision-maker possesses the official power of the enterprise, this adoption of the biased decision becomes the act of the employer.

In contrast, where employment actions do not involve mere rubberstamping but rather reflect independent decisions of agents with delegated authority to take the acts in question, vicarious liability may be properly imposed for unlawfully motivated actions that cause those independent decisions only if, in addition to but-for and proximate causation rules being satisfied, the unlawfully motivated actions are themselves official exercises of delegated authority. Acts *not* involving the exercise of delegated authority are not acts of the employer, they do not carry with them an "imprimatur of the enterprise," and should not subject employers to vicarious liability.

For example, where an employer has not delegated the duty of reporting about plaintiff to fellow employees or independent contractors, but rather those individuals take upon themselves the initiative to bring some information to management's attention, there is no exercise of "official" act of delegated authority. Similarly, there is no exercise of official delegated authority—even by a direct supervisor of the plaintiff—where that supervisor's bias is manifested in acts not part of his delegated duties. Just as in the sexual harassment context, proximity and regular contact are not enough to satisfy the "aided in the agency relation" standard. *Burlington*, 524 U.S. at 760. Only the exercise of delegated authority suffices, as only such acts carry the "imprimatur" of the enterprise.

II. Accordingly, the Tenth Circuit's decision in this case should be reversed. That court, at most, performed only the factual causation part of the liability inquiry. It did not critically assess the proximate cause issue; and it largely assumed vicarious liability rather than analyze applicable agency law principles. The court's focus was on whether the bias of the intermediate supervisor had a causal connection to the firing of the discharged employee. By skipping over the proximate cause and agency law inquiries, the Tenth Circuit endorsed a legal analysis that effectively allows automatic imposition of vicarious liability on the employer once factual causation is established. Such a regime unduly narrows the "because of" race standard, and impermissibly expands the meaning of "agent" in 42 U.S.C. § 2000e(b). Contrary to the court below, this Court has already held that the term "agent" in Title VII has a significantly more narrow meaning than that term has at common law.

ARGUMENT

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides that "an employer" may not "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect

to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Title VII further provides that an "employer" is "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." *Id.* § 2000e(b). There is no issue here concerning whether petitioner is an "employer"; it plainly is. Rather, the question here is whether "any agent" of petitioner "discharge[d]" the plaintiff "because of such individual's race . . . ." The court below oversimplified the issues raised by that question and then did not analyze them correctly. Accordingly, the judgment of the court below should be reversed in pertinent part.

I. FOR AN EMPLOYER TO BE HELD LIABLE UNDER TITLE VII, A PLAINTIFF MUST ESTABLISH BOTH THAT UNLAWFUL MOTIVATION CAUSED AN ADVERSE EMPLOYMENT ACTION AND THAT THE EMPLOYER IS LEGALLY RESPONSIBLE FOR THAT DISCRIMINATORY MOTIVATION UNDER APPLICABLE AGENCY LAW PRINCIPLES

As explained in detail below, whether "any agent" of petitioner "discharge[d]" an employee "because of such individual's race" raises two distinct sub-issues—a causation issue and an agency issue. As to causation, the sub-question is whether an unlawful motivation was both a but-for and proximate cause of the adverse employment action at issue. As to agency, the sub-question is whether applicable agency-law principles make petitioner legally accountable for that allegedly unlawful motivation. As the statutory language makes plain, both causation and agency are necessary conditions for imposition of vicarious liability on an employer.

A. The Plaintiff Must Show That Unlawful Motivation Was Both A But-For And Proximate Cause Of The Adverse Employment Action

With regard to the causation question, this Court has indicated on other occasions that Title VII is informed by principles of common law causation. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 263 (1989) (O'Connor, J., concurring in the judgment); *see also Malley v. Briggs*, 475 U.S. 335, 345 n.7 (1986) (common-law causation principles inform imposition of liability under section 1983). Those principles limit liability to acts that are both a but-for and proximate cause of the injury suffered.

At common-law, it has long been recognized that causation has both factual and legal components. "[C]ausation is binary, comprising causation in fact and proximate, or legal, causation; it must be shown both that the plaintiff's harm would not have occurred but for the defendants' breach of a legal duty and that the breach proximately caused the harm, that is, that the defendant should bear legal responsibility for the injury." 57A Am. Jur. 2d NEGLIGENCE § 435 (2006). *See also* RESTATEMENT (SECOND) OF TORTS §§ 430-431 (1965) (same). Thus, "determinations of proximate or legal cause involve not only an inquiry into whether there was an actual 'cause-in-fact' relation" between the act and the injury, but "also considerations of policy." 57A Am. Jur. 2d NEGLIGENCE § 466 (citing proximate-causation cases) (2006). *See also Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) ("What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations. . . . What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."). Indeed, it was these "considerations of policy" that led the common law to recognize the concept of a "superseding" cause—to wit, "an act of a third person or other force which

by its intervention prevents the actor from being liable for harm to another which his or her antecedent negligence is a substantial factor in bringing about." 57A Am. Jur. 2d NEGLIGENCE § 561 (2006).

Not surprisingly, in construing all sorts of federal statutes, this Court has long resorted to and embraced both but-for and proximate causation principles. The Court has required "but-for" causation in order to limit liability to only injuries that an actor has factually produced. *See, e.g., Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266 (1992) (observing that that but-for causation is necessary so that only "factually injured plaintiffs . . . recover"). And the Court has explained that "we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" *Id.* at 268 (citing WILLIAM L. KEETON, *ET AL.*, PROSSER & KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984)) (using the proximate cause concept to limit recovery in RICO actions).

On this notion, the Court has held that concepts of but-for and "proximate causation" limit liability under a variety of statutory schemes, including RICO, the Clayton Act, and the FTCA. *See, e.g., Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1997 (2006) (plaintiff cannot maintain its claim on § 1962(c) of RICO in the absence of proximate cause); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 703 (2004) (liability under the FTCA requires "proximate causation," which is the "notion of cause . . . necessary to connect the domestic breach of duty (at headquarters) with the action in the foreign country . . . producing the foreign harm or injury. [Thus,] [i]t is necessary . . . to conclude that the act or omission at home headquarters was sufficiently close to the ultimate injury, and sufficiently important in producing it, to make it reasonable to follow liability back to the headquarters behavior"); *Associated Gen. Contractors of*

Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536 (1983) (a plaintiff's right to sue under § 4 of the Clayton Act requires a showing that the defendant's violation not only was a but-for cause of his injury, but was the proximate cause as well). *See also Blue Shield v. McCready*, 457 U.S. 465, 477 n.13 (1982) (quoting Judge Andrews' dissent in *Palsgraf* defining proximate causation).

The Court's practice with regard to causation evidences itself in Title VII and other employment discrimination cases as well. The Court has repeatedly stated that, in such cases, liability "'depends on whether the protected trait . . . actually motivated the employer's decision.' That is, the plaintiff's age must have 'actually played a role in the [employer's decisionmaking] process and had a determinative influence on the outcome." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 141 (2000) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (brackets in original)). *See also Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004); *Price Waterhouse*, 490 U.S. at 241-42 (plurality opinion); *Reeves*, 530 U.S. at 151-52.

Although the Court has not always analyzed the but-for and próximate causation components separately, the federal courts of appeals have regularly done so. *See, e.g., Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 562 (5th Cir. 1998) (to recover under the ADA, "[t]here must be some cognizable injury in fact of which the violation is a legal and proximate cause for damages to arise from a single violation"); *Shick v. Ill. Dep't of Human Servs.*, 307 F.3d 605, 615 (7th Cir. 2002) (requiring showing of both but-for and proximate causation); *Hamilton v. Rodgers*, 791 F.2d 439, 444 (5th Cir. 1986) (plaintiff's burden in Title VII case is to prove that harassment proximately caused injury), *abrogated on other grounds by Harvey v. Blake*, 913 F.2d 226 (5th Cir. 1990).

Consistent with this approach, the federal courts of appeals have also long recognized that reasonable anti-

discrimination policies and procedures—such as reasonable investigations by a decision-maker—may negate proximate causation. *See, e.g., Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996) ("If [the President of Eastfield College] based his decisions on his own independent investigation, the causal link between [the supervisors'] allegedly retaliatory intent and Long and Reavis's terminations would be broken."); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) ("Lehnst did not fire Shager; the Career Path Committee did. If it did so for reasons untainted by any prejudice of Lehnst's against older workers, the causal link between that prejudice and Shager's discharge is broken."); *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997) ("[I]t is clear that, when the causal relationship between the subordinate's illicit motive and the employer's ultimate decision is broken [by an investigation], and the ultimate decision is clearly made on an independent and a legally permissive basis, the bias of the subordinate is not relevant."); *Wilson v. Stroh Cos.*, 952 F.2d 942, 946 (6th Cir. 1992) (where a decision-maker conducted an independent investigation, the "causal nexus" between a biased supervisor's action and the discharge "is absent").

This Court should embrace this particular practice of the lower courts. Recognition that reasonable anti-discrimination policies and practices such as investigations break the chain necessary for legal causation promotes Title VII's "prophylactic" goal, *Kolstad*, 527 U.S. at 545, of providing incentives to employers to create mechanisms to "avoid harm" from discrimination. *Faragher*, 524 U.S. at 805-06; *see also Kolstad*, 527 U.S. at 544 (declining to adopt a rule that would "would reduce the incentive for employers to implement antidiscrimination programs"). Encouraging reasonable anti-discrimination practices and procedures, such as investigations by an independent decision-maker, promotes the salutary objective of ensuring that a discriminatory bias by an employee is not embraced by the company. Indeed, this Court has emphasized that it is

imperative to "recognize the employer's affirmative obligation to prevent violations and give credit . . . to employers who make reasonable efforts to discharge their duty." *Faragher*, 524 U.S. at 806.

B. The Plaintiff Must Show That, Under Applicable Agency Law Principles, The Employer Is Legally Responsible For The Discriminatory Motivation That Caused An Adverse Employment Action

In any event, it is also well-established that causation alone is insufficient to impose liability on an employer for a discriminatory motivation that results in an adverse employment action. The discriminatory motivation may have been held by a person or entity for whom the employer is not legally responsible. Thus, for liability to be imposed, a legal rule allowing imposition of agency-based liability is also required; and, for that reason, even where causation exists, liability does not always lie. The question is whether, in the particular context, applicable agency law principles allow an unlawfully motivated act to be attributed to the employer.

1. This Court's cases demonstrate that, even where a biased motivation caused an adverse employment action, liability for the employer does not always follow. For example, in the context of suits against municipalities under Sections 1981 and 1983 predicated upon allegedly biased actions of the municipality's employees, the Court has refused to impose *respondeat superior* liability for municipalities, with the narrow exception for actions taken pursuant to the official municipal policy. *See Monnell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978) (section 1983 analysis); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 736 (1989) (section 1981 analysis).

The Court has also similarly held that, in cases arising under Section 1981, employers may not be held vicariously liable for a union's discriminatory operation of a hiring hall. *See Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458

U.S. 375, 378 (1982). The Court reasoned that holding employers vicariously liable for a union's discriminatory actions would be "alien to the fundamental assumptions upon which the federal labor laws are structured." *Id.* at 393.

The Court's cases construing Title VII have similarly held that causation alone is not a sufficient basis for imposition of liability upon an employer. As the Court first explained in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), vicarious liability under Title VII requires reference to traditional agency law principles, as appropriately modified to reflect the policies and purposes of Title VII. In *Vinson*, the Court emphasized that "Congress's decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." 477 U.S. at 72. And the Court added that "common-law [agency] principles may not be transferable in all their particulars to Title VII." *Id.*

2. This Court's subsequent decisions have reiterated both that causation alone is not legally sufficient and that Title VII's vicarious liability rules find only their "*starting* point" in common law agency principles. *Faragher*, 524 U.S. at 803 n.3 (noting that "our obligation here is not to make a pronouncement of agency law in general or to transplant § 219(2)(d) into Title VII") (emphasis added). These principles are then "adapt[ed] . . . to the practical objectives of Title VII." *Id.*

As this Court has explained, the doctrine of "*respondeat superior*, as traditionally conceived . . . enables the imposition of liability on a principal for the tortious acts of his agent and, in the more common case, on the master for the wrongful acts of his servant." *Gen. Bldg. Contractors*, 458 U.S. at 392 (citing RESTATEMENT (SECOND) OF AGENCY §§ 215-216, 219). Under general principles of agency law, "[a]n employer may be liable for both negligent and intentional torts committed by an employee within the scope

of his or her employment." *Burlington*, 524 U.S. at 756; RESTATEMENT (SECOND) OF AGENCY § 229(1). Furthermore, in certain "limited circumstances," general principles of agency law, as reflected in the Restatement applicable at the time of Title VII's enactment, allow imposition of vicarious liability where an employee acts outside of the scope of the employment:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
> (b) the master was negligent or reckless, or
> (c) the conduct violated a non-delegable duty of the master, or
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he *was aided in accomplishing the tort by the existence of the agency relation.*

Burlington, 524 U.S. at 758 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)) (emphasis added); *id.* (citing RESTATEMENT (SECOND) OF AGENCY § 219, cmt. *e* (Section 219(2), which "enumerates the situations in which a master may be liable for torts of servants acting solely for their own purposes and hence not in the scope of employment")).

As courts have recognized, however, there would be substantial danger in interpreting the "aided by the agency relation" standard too literally. It would unreasonably impose strict liability on employers for many a frolic and detour that the employer simply cannot reasonably control or prevent:

> Courts have criticized § 219(2)(d) primarily because the exception swallows the rule and amounts to an imposition of strict liability

> upon employers. Indeed, it is difficult to conceive of an instance when the exception would not apply because an employee, by virtue of his or her employment relationship with the employer is always "aided in accomplishing" the tort. Because the exception is not tied to the scope of employment but, rather, to the existence of the employment relation itself, the exception strays too far from the rule of *respondeat superior* employer nonliability.

Zsigo v. Hurley Med. Ctr., 716 N.W.2d 220, 226 (Mich. 2006) (footnotes omitted). For this reason, state courts have frequently declined to extend agency principles as far as the "aided in the agency relation" standard would extend them. *See, e.g., id.* at 234 n.11; *Groob v. Keybank*, 843 N.E.2d 1170, 1179 (Ohio 2006); *Salinas v. Genesys Health Sys.*, 688 N.W.2d 112, 113 (Mich. Ct. App. 2004).

This Court similarly made clear that agency law principles applicable in Title VII cases do *not* extend to acts merely because they were "aided" by "the existence of the agency relation." The Court reasoned that "most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation" as "[p]roximity and regular contact may afford a captive pool of potential victims." *Burlington*, 524 U.S. at 760; *see id.* at 763 (citing *Meritor*, 477 U.S. at 77 (Marshall, J., concurring in judgment) ("[I]t is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates.")); *Faragher*, 524 U.S. at 797 ("mechanical application" of the RESTATEMENT's § 229 is unwarranted). Because a literal application of the "aided in the agency relation" test in the employment context would impose too broad a liability, the Court concluded that imposition of liability "requires the existence of something *more* than the

employment relation itself." *Burlington*, 524 U.S. at 760 (emphasis added).

For example, in the sexual harassment context, the Court has held that employers may be vicariously liable "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Faragher*, 524 U.S. at 808. Furthermore, the Court has held that vicarious liability may be imposed on an employer "for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Faragher*, 524 U.S. at 807; *Burlington*, 524 U.S. at 765. However, the Court has also held that, even in cases involving supervisor misconduct, "[w]hen no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages," comprised of two necessary elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington*, 524 U.S. at 765. The Court reached this result by "accommodat[ing] the agency principles . . . as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees." *Id.* at 764.

Relatedly, in the context of determining the availability of punitive damages under Title VII, the Court similarly declined to apply literally the "aided in the agency relation" standard. *See Kolstad*, 527 U.S. at 542-43. The Court noted that the Restatement of Agency itself restricts the imposition of punitive damages on the employer under *respondeat superior* principles. *Id.* at 543 (citing RESTATEMENT (SECOND) OF AGENCY § 217(C)). However, the Court deemed even the limited circumstances enumerated by the Restatement to impose too broad a standard for potential vicarious liability and concluded that Title VII further

curtails the availability of punitive damages against employers. *Id.* at 544. The Court explained that the "prophylactic goals" of Title VII would be disserved by the blanket adoption of the Restatement and held that it was necessary "to modify these principles to avoid undermining the objectives underlying Title VII." *Id.* at 545. Specifically, the Court held that "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII." *Id.*

3. This case raises the distinct question of whether and when employer liability exists under agency principles applicable in Title VII cases for employee acts that, while perhaps causally related to an adverse employment actions, are not themselves tangible employment actions of the kind referred to in *Faragher* and *Burlington*. The answer to that question is informed by general agency law principles, as well as by this Court's Title VII cases modifying those principles for appropriate application in the Title VII context. These authorities suggest that imposition of vicarious liability on an employer for its employee acts that are not themselves tangible adverse employment actions is appropriate only where the acts constitute the exercise of official delegated authority.

As a threshold matter, it is important to distinguish the actors from whom the employer may receive input in making an adverse employment decision and the wide variety of acts these actors perform. The employer acts through its managers who make the adverse decisions. Those managers may receive input regarding a plaintiff's performance from other managers, intermediate supervisors, shop floor employees, independent contractors, unions, and other individuals or entities that have a chance to observe the plaintiff. In deciding to terminate a plaintiff, the manager decision-maker may adopt the recommendation of another manager. The decision-maker may also receive a report on a

plaintiff's performance from an intermediate supervisor, who is not empowered to recommend a particular action or to take any official action. The decision-maker may also be made aware of an informal hallway discussion regarding plaintiff's performance or receive a message, whether from an identified source or an anonymous one, regarding plaintiff's performance. The actions of an employer's employees span a broad spectrum and, both because of their variety and their differing relationship to delegated authority (or lack thereof), should not all necessarily trigger vicarious liability under Title VII.

Rather, the Court's Title VII jurisprudence suggests that vicarious liability may be properly imposed on an employer only for "official acts" that "become[] . . . the act of the employer," "a company act." *Burlington*, 524 U.S. at 762. The most obvious class of such acts is "when a supervisor takes a tangible employment action against the subordinate"; "we think it reflects a correct application of the aided in the agency relation standard." *Id.* at 760-61. It is proper to impose vicarious liability for "tangible employment actions" because these "are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." Such acts have "an imprimatur of the enterprise." *Id.* at 762.

It follows that an employer should also have vicarious liability for managerial actions that involve no independent assessment but merely rubberstamp discriminatory actions of subordinate employees who are in effect *de facto* decision makers. An "official" act is committed by a biased employee when he is effectively allowed to make the final decision that adversely affects the plaintiff. Thus, the employer is liable when it *acts* through a biased employee by virtue of delegating to him decision-making authority (and making him a *de facto* decision-maker) to "discharge" plaintiff "because of [plaintiff's] race." As this Court has explained, holding an employer vicariously liable is appropriate because, in these circumstances, "'the [employee] and the employer merge[d] into a single entity,'" *Id.* (quoting

Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992)), and the biased employee's act became the "official act." *See also* RESTATEMENT (SECOND) OF AGENCY § 219, cmt. a ("The assumption of *control* is a usual basis for imposing tort liability when the thing controlled causes harm.") (emphasis added).

In contrast, when employment actions do not involve mere rubberstamping but rather reflect independent decisions of agents with delegated authority, vicarious liability may properly be imposed (for unlawfully motivated actions that influence independent decisions) only where the unlawfully motivated influence involves an exercise of delegated authority (and factual and proximate causation are established). In elaborating on the scope of the "aided by the agency" standard, the Court in *Burlington* cited *Shager*, 913 F.2d at 405-06, a case where the plaintiff was formally fired by the Career Path Committee, but which allegedly acted on a report by a biased intermediate supervisor. *Burlington*, 524 U.S. at 762-63. The *Shager* court held that if the Committee "acted as the conduit of [the supervisor's] prejudice—his cat's paw—the innocence of its members would not spare the company from liability." 913 F.2d at 405. However, the court added that, if the committee "was not a mere rubber stamp, but made an independent decision to fire Shager, there would be no ground for finding willful misconduct by" the employer. *Id.* at 406. In such circumstances, the "official" responsibility for the adverse employment action would lie with, and would be exercised by, the committee—and not by the employee with the alleged bias.

This distinction between unauthorized employee actions and official actions has been repeatedly recognized by federal courts of appeals. *See, e.g., Muegge v. Heritage Oaks Golf & Country Club, Inc.*, No. 06-12850, 2006 WL 3591957, at *4 (11th Cir. Dec. 12, 2006) (no vicarious liability for theft by employees because employees "were hired to paint the exterior of the Club Homes III residences and were not authorized by Cotton and Martin to enter any of

the residences"); *Booker v. GTE.net LLC*, 350 F.3d 515, 519 (6th Cir. 2003) (no vicarious liability for employer for unauthorized acts of its employee); *Jones v. Baisch*, 40 F.3d 252, 255 (8th Cir. 1994) (same). *See also Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 287-88 (4th Cir. 2004), *cert. dismissed*, 543 U.S. 1132 (2005) (discussing *Burlington* and *Shager* to support the "actual decision-maker" test for vicarious liability). It is also reflected in this Court's decisions, for example, regarding the necessary conditions for imposition of punitive damages in Title VII cases. *See, e.g., Kolstad*, 527 U.S. at 542-43. These cases recognize that the key to proper imposition of vicarious liability must be the delegation of authority by an employer, as liability is properly imputed to an employer only for the discriminatory exercise of authority that it has delegated.

Correlatively, acts *not* involving delegated authority that do not carry with them an "imprimatur of the enterprise" should not subject an employer to vicarious liability. For example, the current employer may take an adverse employment action upon receiving a negative recommendation about the employee from his prior employer, who provides false negative information because of the racial bias. However, despite the existence of causation, the current employer would not be vicariously liable because he is not legally responsible for the prior employer. Or, where the plaintiff's fellow employee brings to the decision-maker's attention a conversation overheard in the hall involving the plaintiff, or where an independent contractor sends a note to the manager complaining about the plaintiff, these employees are not exercising delegated authority. The employer has not delegated the duty of reporting about plaintiff to fellow employees or independent contractors; rather, those individuals take upon themselves the initiative to bring some information to the management's attention. To be sure, they would not be able to observe plaintiff's behavior at the place of business had they not been also empowered to be there by the virtue of their agency

relationship with the employer. But, just as in the sexual harassment context, proximity and regular contact are not enough to impose vicarious liability because they "may afford a captive pool of potential victims" and would cover "most workplace tortfeasors," including "co-worker[s]." *Burlington*, 524 U.S. at 760. "Something more" than "proximity and regular contact" is required for imposing vicarious liability for alleged racial discrimination. *Id.*

Similarly, there is no exercise of official delegated authority even by a direct supervisor of the plaintiff where that supervisor's actions are not part of his official delegated duties. "[T]he ultimate focus must be on agency, not supervisory status. The [adjudicator] cannot . . . move straight from a finding of supervisory status to a finding of liability without considering evidence showing that the supervisor did not speak on behalf of management." *NLRB v. Schroeder*, 726 F.2d 967, 969 (3d Cir. 1984). It is not enough that the supervisor speaks, or that the supervisor complains, or that the supervisor influences; rather, the supervisor must be exercising delegated authority in taking the allegedly discriminatory acts, if the employer is to be held vicariously liable for them. *Cf. Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring in judgment) ("statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself" do not suffice to show that the employment decision was based on illegitimate criteria).

This approach to vicarious liability is necessary to properly achieve Title VII's goals. As this Court has recognized, Title VII does not intend to make employers liable for every frolic and detour of their employees. *See, e.g., Faragher*, 524 U.S. at 798 ("[T]here is no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope and acts amounting to what the older law called frolics or detours from the course of employment."). Rather, Title VII intends to make employers liable only for discriminatory actions that

an employer has empowered an employee to take and that the employer could reasonably have controlled and, if necessary, prevented. *Id.* at 798-99. Moreover, imposing vicarious liability for acts that do not entail exercise of official delegated authority, such as where a renegade low-level employee's bias somehow caused a discriminatory action, is not "just." *Faragher*, 524 U.S. at 797 (quoting RESTATEMENT (SECOND) OF AGENCY and explaining that "'the ultimate question'" in imposing vicarious liability is whether "'it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed'"). The employer's "exercise of reasonable care" through the official and formal promulgation and enforcement of anti-discrimination policies, as expected where the employer has a large work force, should be rewarded; and, even where factual and proximate causation exist, liability should be imposed only for the discriminatory exercise of delegated authority that the employer officially ceded to the allegedly abusive employee. *Id.* at 808.

II. THE TENTH CIRCUIT'S DECISION IS INCORRECT BECAUSE IT ATTEMPTED ONLY THE FACTUAL CAUSATION PART OF THE INQUIRY AND DISREGARDED THE AGENCY LAW INQUIRY

The Tenth Circuit's decision below should be reversed. The court performed only the factual causation part of the liability inquiry. It did not seriously conduct either the proximate causation or the agency law inquiry.

First, the Tenth Circuit did not conduct a proper proximate causation inquiry. The court seriously considered only whether a factual "causal" connected existed between Mr. Grado's alleged bias and the termination action in issue. Appendix to Petitioner BCI Coca-Cola's Petition for Certiorari (hereinafter "Pet. App.") 26a-30a. The court did not seriously consider the proximate causation issue: While

the court suggested that pulling a personnel file is not a legally sufficient investigation, Pet. App. 31a, in doing so, it ignored that Ms. Edgar did much more—including "h[olding] a series of phone calls with Ms. Pederson ["[t]he highest-ranking human resources official in the Albuquerque office"] . . . and Mr. Grado concerning Mr. Peters' conduct." Pet. App. 3a, 6a. Moreover, in suggesting that an investigation is necessarily flawed if the decision-maker does not ask the employee for "his side of the story," Pet. App. 28a, the court proposed a wholly unworkable and impracticable standard, as geography, timing, workplace needs and other such circumstances may make such an individual interview inappropriate and infeasible. Indeed, the court failed directly to confront either the district court's finding that the investigation was reasonable in the circumstances, *see* Pet. App. 63a, 67a, or the decisions of other courts that have found proximate cause lacking where the decision-maker herself indisputably was not biased and made reasonable business judgments about the investigation to conduct in the circumstances, *see, e.g.*, *Long*, 88 F.3d at 307; *Shager*, 913 F.2d at 405; *Willis*, 118 F.3d at 547; *Wilson*, 952 F.2d at 946. A proper proximate cause inquiry would take account of all of the facts of record and make a legal judgment about proximate cause based on the relevant case law and with appropriate deference to the business judgment that employers must exercise in response to conflicting demands and pressures of the particular circumstances.

Second, the court did not undertake a proper vicarious liability analysis under agency principles applicable in Title VII cases. The Tenth Circuit largely assumed vicarious liability and instead focused almost entirely on whether the bias of the employee had a causal connection to the firing. The court did not critically analyze whether applicable agency principles properly made petitioner liable for any such bias.

The predominant feature of Part II(A) of the opinion, "Subordinate Bias Liability," Pet. App. 14a, which purports to lay out the legal rules, is explaining and taking a position on the causation debate—the "level of control a biased subordinate must exert over the employment decision." Pet. App. 18a. The Tenth Circuit rejected the Fifth Circuit's "any influence" standard because it "improperly eliminates a requirement of *causation*." Pet. App. 19a (emphasis added). The Tenth Circuit also rejected the Fourth Circuit's "actual decision-maker" standard, because the Tenth Circuit agreed with the Seventh Circuit that the Fourth Circuit's analysis is "inconsistent with the normal analysis of *causal* issues in tort litigation." Pet. App. 20a (emphasis added; internal quotation marks omitted).

In Part II(B) of the opinion, "The Subordinate Bias Claim in this Case," Pet. App. 22a-31a, the decision below continues its predominant focus on the factual causation issue and disregards the vicarious liability inquiry. After discussing Mr. Grado's alleged racial bias in Subpart II(B)(1), Pet. App. 23a-26a, the court moves on to the final portion of the opinion, Subpart II(B)(2), entitled "Pretext and *Causation*," Pet. App. 26a-31a (emphasis added). After discussing whether the firing was pretextual, Pet. App. 26a-30a, the court addresses whether Ms. Edgar conducted an independent investigation and holds that "directing Ms. Pederson to pull Mr. Peters' personnel file," which did not contain information about the recent incident, constitutes inadequate investigation as a matter of law. Pet. App. 30a. Therefore, the court concludes, "a jury could conclude that Mr. Grado's factually disputed report—the sole source of information on which Ms. Edgar relied—*caused* the termination." Pet. App. 31a (emphasis added). Thus, yet again, the court's predominant focus is on the factual causation of the termination.

To be sure, two paragraphs of Part II(A) of the opinion discuss concepts of vicarious liability, but, crucially, they do so without performing any serious analysis and without

recognizing the import of this Court's caselaw on the "aided by the agency relation" standard. The court first spent a paragraph reciting the application of the "aided . . . by the existence of the agency relation" standard by this Court in *Meritor*, *Burlington* and *Faragher*. Pet. App. 16a-17a. The court then added another paragraph to express its endorsement of "[h]olding employers accountable for the actions of biased subordinates," because it "advances the goals of Title VII," such as "deterren[c]e" and "creation of "employer procedures that prevent discriminatory actions." Pet. App. 17a-18a. In that same paragraph, the opinion notes that, because "a company's organizational chart does not always accurately reflect its decisionmaking process," Pet. App. 17a (citing *Reeves*, 530 U.S. at 151-52), "[r]ecognition of subordinate bias claims forecloses a strategic option for employers who might seek to evade liability, even in the face of rampant race discrimination among subordinates, through willful blindness." Pet. App. 18a. But, at the end of these two paragraphs, which recognize that this Court has modified Restatement 219(d)(2)'s "aided . . . by the existence of the agency relation" standard to conform to Title VII's goals, the court never proceeded to examine the reach of that standard in this particular context.

The court below omitted this crucial analysis even though it had stated, at the outset, that, "[f]or the EEOC to prevail, it must make not only a factual showing that Mr. Grado harbored racial animus toward black employees, but also a convincing legal claim that his racial animus *should be imputed to BCI* despite the fact that Mr. Grado had no power to terminate anyone." Pet. App. 14a (emphasis added). Rather than follow through on this acknowledgment of the distinct role that agency principles play in the proper analysis, however, the court below instead switched to the discussion of factual causation, as explained above, and never answered the difficult agency law question.

By not completing the agency law inquiry, the Tenth Circuit has effectively inaugurated a regime that

automatically imposes vicarious liability on an employer once causation is established. Such automatic imposition of liability impermissibly expands the meaning of "agent" in 42 U.S.C. § 2000e(b), which this Court has already held to have a significantly more narrow meaning that the Restatement gives that term. The Tenth Circuit's approach is contrary to this Court's explicit rejection of such an approach in Title VII cases, because it would impose too broad of a liability:

> [The] employer is not "*automatically*" liable for harassment by a supervisor who creates the *requisite* degree of discrimination, and there is obviously some tension between that holding and the position that a supervisor's misconduct aided by supervisory authority subjects the employer to liability vicariously; if the "aid" may be the unspoken suggestion of retaliation by misuse of supervisory authority, the risk of *automatic* liability is high.

Faragher, 524 U.S. at 804 (emphases added; footnote omitted).

Accordingly, because the decision below did not apply the correct proximate cause and agency law tests, it should be reversed. Those tests require inquiry into (1) whether Mr. Grado's bias in his reporting to Ms. Edgar was the proximate cause of the firing, and (2) whether Mr. Grado was officially exercising delegated authority in the specific discriminatory actions he is alleged to have taken.

In the causation inquiry, the question will be whether Mr. Grado's alleged bias was both the but-for and proximate cause of the termination. In this regard, proper weight must be given to the investigation undertaken by Ms. Edgar, in light of this Court's admonition to provide employers with incentive to create mechanisms to "avoid harm" of discrimination. *Faragher*, 524 U.S. at 805-06.

In the agency inquiry, the question will be whether petitioner delegated to Mr. Grado the authority to take the actions that respondent claims are discriminatory. The inquiry should look at the nature of Mr. Grado's duties; whether he was delegated authority to report on plaintiff's conduct; and whether Ms. Edgar, in terminating the plaintiff, then ratified and adopted as her own the allegedly biased acts.

With regard to both the proximate cause and agency law inquiries, due account should be taken of BCI Coca-Cola's non-discrimination policies, as well as its prevention and complaint procedures. Courts should "give credit" to an employer's "reasonable efforts to discharge" its "duty" to comply with Title VII. Such analysis would "implement clear statutory policy and complement the Government's Title VII enforcement efforts." *Id.* at 806.

CONCLUSION

For the foregoing reasons, the decision below should be reversed in pertinent part.

Respectfully submitted,

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

GLEN D. NAGER
(Counsel of Record)
VICTORIA DORFMAN
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

SAMUEL ESTREICHER
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

February 20, 2007

Counsel for Amicus Curiae

No. 06-341

IN THE

Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

RAE T. VANN
Counsel of Record
MCGUINESS, NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005
(202) 789-8600

Attorneys for *Amicus Curiae* Equal Employment Advisory Council

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS CURIAE*	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THE STANDARD APPLIED BY THE COURT BELOW FOR EVALUATING SO-CALLED "CAT'S PAW" SUBORDINATE BIAS DISCRIMINATION CLAIMS IS INCONSISTENT WITH WELL-ESTABLISHED PRINCIPLES OF TITLE VII LAW	7
A. The Burden-Shifting Analysis Established by This Court in *McDonnell Douglas Corp. v. Green* Sets Forth the Proper Standard for Evaluating Title VII Disparate Treatment Claims	8
B. The Tenth Circuit's Rule Enables Plaintiffs To Circumvent Title VII's Pretext Proof Requirements	9
II. REQUIRING EMPLOYERS TO EXAMINE THE MOTIVES OF EVERY INFORMANT OF POSSIBLE MISCONDUCT WOULD UNDERMINE EFFORTS TO PROACTIVELY INVESTIGATE AND RESOLVE SUCH INCIDENTS	14

TABLE OF CONTENTS—Continued

Page

III. SUBJECTING EMPLOYEES REPORTING MISCONDUCT TO "BIAS" EXAMINATIONS WOULD CREATE A CHILLING EFFECT ON THEIR WILLINGNESS TO MAKE LEGITIMATE COMPLAINTS AND THUS WOULD DISCOURAGE CONSISTENT APPLICATION OF WORKPLACE RULES 16

CONCLUSION 17

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Argo v. Blue Cross & Blue Shield of Kansas, Inc., 452 F.3d 1193 (10th Cir. 2006) 12
Board of Trustees of Keene College v. Sweeney, 439 U.S. 24 (1978) 9
Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) 15
Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 14, 15
Haughton v. Orchid Automation, 2006 U.S. App. LEXIS 29068 (6th Cir. 2006) 13
Hill v. Lockheed Martin Logistics Management, Inc., 354 F.3d 277 (4th Cir. 2004), *cert. dismissed*, 543 U.S. 1132 (2005) 11
Lust v. Sealy, Inc., 383 F.3d 580 (7th Cir. 2004) ... 10
Mateu-Anderegg v. School District of Whitefish Bay, 304 F.3d 618 (7th Cir. 2004) 11
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 7, 8, 10, 13
Millbrook v. IBP, Inc., 280 F.3d 1169 (7th Cir. 2002) 9, 13
Pippin v. Burlington Resources Oil & Gas Co., 440 F.3d 1186 (10th Cir. 2006) 12
Reed v. Lawrence Chevrolet, Inc., 108 Fed. Appx. 393 (7th Cir. 2004) 9
Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 11
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 9, 12, 13
Wascura v. City of South Miami, 257 F.3d 1238 (11th Cir. 2001) 12

TABLE OF AUTHORITIES

FEDERAL STATUTES — Page

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ..... *passim*
42 U.S.C. § 2000e-2(a)(1) 6, 8

IN THE

Supreme Court of the United States

No. 06-341

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*. Letters of consent from both parties have been filed with the Clerk of the Court. The brief urges reversal of the decision below and thus supports the position of Petitioner BCI Coca-Cola Bottling Company of Los Angeles before this Court.[1]

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 310 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

EEAC's members are all employers subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and other federal and state employment nondiscrimination laws. As potential defendants to claims of discrimination under Title VII, EEAC's members have a direct and ongoing interest in the issue presented before this Court concerning the circumstances under which an employer should be held liable for intentional discrimination based on the alleged bias of a subordinate employee who was not involved in the ultimate employment decision.

The court below held that an employer who is accused of intentional discrimination based on the bias of a subordinate employee who provided information leading to the challenged employment decision but was not involved in the decision itself can never obtain summary judgment unless it conducted an "independent investigation" to rule out any underlying unlawful motives on the subordinate employee's part. It thus permitted a discrimination claim to proceed, despite the plaintiff's failure to rebut the employer's legitimate, nondiscriminatory reason for its decision and regardless of the fact that the actual decisionmaker, who herself harbored

no discriminatory animus, never received any input or recommendation from the biased employee regarding what employment decision should be made.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed over 570 briefs as *amicus curiae* in cases before the Supreme Court, the United States Courts of Appeals, and various state supreme courts. Thus, EEAC has an ongoing interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is well situated to brief this Court on the ramifications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Stephen Peters worked for Petitioner BCI Coca-Cola Bottling Company ("BCI") as a merchandiser at its Albuquerque, New Mexico location. *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 478 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007). Peters, who is African-American, reported to Cesar Grado, the District Sales Manager, who is Hispanic. *Id.* Peters was supervised on a day-to-day basis by Jeff Katt, a white male. Katt, like Peters, reported directly to Grado. *Id.* While Grado did have general supervisory responsibilities over certain employees, he was "not authorized to discipline or terminate anyone." *Id.*

Among other things, Grado was responsible for scheduling merchandisers to service accounts within his territory. *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 2004 U.S. Dist. LEXIS 28277, at *3 (D.N.M. June 10, 2004), *rev'd*, 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007). In September 2001, Grado contacted Katt about asking Peters to work one of his regularly scheduled days off as a result of a coverage gap. *Id.* at *9. After being informed by Katt that he did not believe Peters would be willing to work

on Sunday, Grado contacted Patricia Edgar, BCI's Employee Relations Manager, in her Phoenix, Arizona office to discuss how to proceed. *Id.* at *10. Although Grado ordinarily would have discussed the issue with BCI's local human resources administrator, Sherry Pedersen, Pedersen was not in the office and thus Grado contacted Edgar in the Phoenix office instead. *Id.*

Grado informed Edgar that he suspected Peters would refuse to work and asked for advice on dealing with the situation. Edgar told Grado that if Peters refused to work and was unable to present a compelling reason for his refusal, Grado should explain that Peters was being given a direct order and that failure to comply would be considered insubordination and could lead to termination. *Id.* at *12.

Immediately after speaking with Edgar, Grado informed Peters he would be expected to work on the date in question. Peters said he could not work because he had unspecified "plans" that were "none of Grado's business." *Id.* Following Edgar's advice, Grado then gave Peters a direct order and told him he would be considered insubordinate and could be fired if he refused. Peters responded by saying, "Do what [you've] got to, and I'll do what [I've] got to." *Id.* at *13.

Grado relayed the substance of his exchange with Peters to Edgar. Edgar considered Peters to have engaged in insubordination, which under BCI's policy warranted immediate termination.[2] *Id.* at *7-*8. Before taking any action, however, Edgar asked the local human resources administrator to review Peters' personnel file, which showed a two-day disciplinary suspension and final warning for insubordination in connection with refusal to work on a scheduled day off two years earlier. *Id.* at *15. Based on Grado's description of

---

[2] Under BCI's policy, "insubordination occurs when the employee knows that he is considered to be defying a direct order of the supervisor and that his conduct could lead to termination." *Id.* at *7-*8.

Peters' remarks and the information contained in Peters' personnel file, Edgar made the decision to terminate Peters' employment. She "understood that Peters had already been given more chances than the policy required on this issue, and that any action short of termination could set a bad precedent for BCI's stance on insubordination." *Id.* at *19. Grado was never asked for, and never offered, a discipline recommendation.

Peters filed a race discrimination charge with Respondent Equal Employment Opportunity Commission (EEOC), which eventually sued BCI on Peters' behalf. The agency claimed that Grado was racist, and presented evidence suggesting Grado treated African-Americans more harshly and made racially derogatory comments at work. *Id.* at *22. Although the EEOC conceded that Edgar, the actual decisionmaker, did not have a discriminatory animus, it nevertheless contended that since Grado *was* biased against African-Americans and Edgar's decision was based on his input, the company was liable for discrimination in violation of Title VII.

BCI moved for summary judgment, which the district court granted. The court observed:

> [W]hile the EEOC disputes whether BCI has come forward with a legitimate nondiscriminatory reason for its conduct, the Court believes that BCI's burden is one of production and not of persuasion. Thus, BCI need only articulate a legitimate nondiscriminatory reason for discharging Peters.

Id. at *29. Since Grado did not actually make the decision to terminate Peters, and because Edgar, the actual decisionmaker, had no discriminatory animus and was unaware of Peters' race at the time of discharge, the court concluded the EEOC had failed to prove BCI's proffered reason for termination was a pretext for race discrimination. *Id.* at *30.

The EEOC appealed to the Tenth Circuit, which reversed the district court's ruling and remanded the case for further proceedings. *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007). It found that summary judgment was inappropriate in the case, as a jury could reasonably conclude that Grado's bias drove the company's actions, even though he did not make the actual decision to terminate Peters' employment. The court observed, "[i]n the employment discrimination context, 'cat's paw' refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Id.* at 484 (citation omitted).

Purporting to apply the Seventh Circuit's "causation" approach, the court concluded that an employer may be liable for discrimination under a cat's paw theory if "the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action." 450 F.3d at 487 (citation omitted). BCI filed a petition for writ of certiorari, which this Court granted on January 5, 2007.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, prohibits discrimination in the "terms, conditions or privileges of employment, *because of* such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Plaintiffs alleging disparate treatment discrimination under Title VII bear the ultimate burden of proof and cannot, as a matter of law, prevail if they are unable to refute an employer's legitimate, nondiscriminatory reason for the challenged employment decision.

The rule applied by the court below impermissibly alters the standard of proof for intentional discrimination claims by

effectively eliminating a plaintiff's burden of showing, by a preponderance of the evidence, that the employer's stated reason for the challenged employment decision is false and a pretext for discrimination. Under the Tenth Circuit's analysis, if a plaintiff alleges discrimination resulting from the bias of a subordinate, non-decisionmaking employee, liability will attach unless the employer can demonstrate that it conducted an "independent" investigation which confirmed its decision was not caused by the alleged underlying bias. The court's rule, as applied, thus unquestionably conflicts with the legal principles established by this Court in *McDonnell Douglas*.

Requiring employers to question the motives of every person who reports wrongdoing so as to rule out any potential underlying bias would be hugely burdensome on employers and would undermine their efforts to proactively investigate and resolve incidents of workplace misconduct. Common sense suggests that the employer's job is to investigate the report and ascertain the facts for itself, rather than to question the motives of the informant. Real-world application of the rule articulated by the court below would severely impede employers' efforts to find and correct suspected misconduct and could create a chilling effect on employees' willingness to make legitimate complaints of workplace problems.

ARGUMENT

I. THE STANDARD APPLIED BY THE COURT BELOW FOR EVALUATING SO-CALLED "CAT'S PAW" SUBORDINATE BIAS DISCRIMINATION CLAIMS IS INCONSISTENT WITH WELL-ESTABLISHED PRINCIPLES OF TITLE VII LAW

The rule applied by the court below impermissibly alters the standard of proof for intentional discrimination claims by effectively eliminating a plaintiff's burden of proving, by a

preponderance of the evidence, that the employer's legitimate nondiscriminatory reason for the challenged employment decision is pretextual. It also would impose upon employers onerous new proof requirements that have no basis in Title VII jurisprudence. Accordingly, the approach advanced by the court below should be rejected by this Court.

A. The Burden-Shifting Analysis Established by This Court in *McDonnell Douglas Corp. v. Green* Sets Forth the Proper Standard for Evaluating Title VII Disparate Treatment Claims

Title VII of the Civil Rights of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, makes it unlawful "for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1). While the burden of production of evidence under Title VII may shift between plaintiff and defendant, the ultimate burden of proving unlawful discrimination lies at all times with the individual asserting a violation of the Act. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Under the burden-shifting analysis articulated by this Court in *McDonnell Douglas*, a plaintiff alleging intentional discrimination must prove, as a threshold matter, that he or she (1) is a member of a class of individuals protected by the Act; (2) is qualified for the employment opportunity in question; (3) was denied the opportunity; and (4) was treated less favorably than persons not of his or her protected class. *Id.* at 802.

After this initial showing, the burden of production of evidence shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment decision. As this Court has held, the employer's obligation is to *articulate*

a legitimate, nondiscriminatory reason, not to affirmatively "*prove absence of discriminatory motive*." *Board of Trustees of Keene Coll. v. Sweeney*, 439 U.S. 24, 25 (1978) (*per curiam*) (emphasis added). Rather, the defendant "must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981).

Once the employer presents a nondiscriminatory reason for the challenged action, the burden shifts back to the plaintiff to prove the employer's stated reason is not worthy of credence and is a pretext for unlawful discrimination. In this context:

> Pretext means a lie, specifically a phony reason for some action. . . . [P]retext for discrimination means more than an unusual act; it means something worse than a business error; "pretext" means deceit used to cover one's tracks.

Millbrook v. IBP, Inc., 280 F.3d 1169, 1175 (7th Cir. 2002) (internal quotations and citations omitted); *see also Reed v. Lawrence Chevrolet, Inc.*, 108 Fed. Appx. 393, 398 (7th Cir. 2004) ("In order to show pretext, moreover, the plaintiff must specifically rebut each legitimate, non-discriminatory reason given by the defendants for not hiring him"). A plaintiff who is unable to demonstrate pretext cannot succeed in his or her Title VII discrimination claim.

B. The Tenth Circuit's Rule Enables Plaintiffs To Circumvent Title VII's Pretext Proof Requirements

Under the Tenth Circuit's analysis, once a plaintiff alleges he or she was subjected to a discriminatory employment practice stemming from the bias of a subordinate, non-decision-making employee, liability will attach unless the employer can demonstrate– through proof of an "independent" investigation—that its decision was not caused by the alleged underlying bias. The burden of proof thus shifts from the

plaintiff to the employer to refute the discrimination claim without the plaintiff ever having to prove pretext. This result unquestionably conflicts with the legal principles established by this Court in *McDonnell Douglas* and therefore should be rejected by this Court.

The sole question before the Tenth Circuit below was whether the EEOC had presented sufficient evidence such that a reasonable jury could conclude BCI's stated reason was false and a pretext for unlawful discrimination. "Because the EEOC's pretext argument depends in part on a subordinate bias theory," the court found, "it must establish a genuine issue of material fact as to whether Mr. Grado's bias translated into discriminatory actions that caused Mr. Peters' termination." 450 F.3d at 490. It stated:

> [U]nder certain circumstances, a defendant may be held liable for a subordinate employee's prejudice even if the manager lacked discriminatory intent. . . . Twice we have held that a plaintiff could not prevail because the decisionmaker had conducted an independent investigation of the facts, rather than relying on the recommendation of the biased subordinate.

Id. at 485 (internal quotations and citations omitted). The court thus transformed the EEOC's obligation to prove pretext into a question of whether, under a subordinate bias theory, BCI could prove that the person responsible for making the termination decision had conducted an "independent investigation" prior to taking such action rather than merely "rubber-stamping" the recommendation of the allegedly biased subordinate employee.

While ostensibly endorsing the Seventh Circuit's standard for evaluating subordinate bias claims, the court below failed to properly apply the rule to the facts of this case. *See Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004) (citing *Mateu-Anderegg v. School Dist. of Whitefish Bay*, 304 F.3d 618 (7th

Cir. 2002)). As the Seventh Circuit observed in *Mateu-Anderegg*:

> It is clear that, when the causal relationship between the [non-decisionmaker's] illicit motive and the employer's ultimate decision is broken, and the ultimate decision is clearly made on an independent and a legally permissible basis, the bias of the [non-decisionmaker] is not relevant. For instance, if objective information from sources other than the biased employee drive the adverse employment action, the subordinate's illicit motives are no longer relevant to the inquiry.

304 F.3d at 627 (internal quotations and citations omitted).

In this case, Edgar discharged Peters based on his (1) insubordinate remarks to Grado—remarks which Peters admitted making—and (2) prior insubordinate behavior under similar circumstances, as was documented in his personnel file. Edgar's decision therefore was based on a completely independent assessment of the facts and was made without any input, real or implied, from Grado. As such, BCI should have been insulated from liability stemming from Grado's alleged bias, since he was not responsible for Peters' discharge. Indeed, this Court's decision in *Reeves v. Sanderson Plumbing* "informs us that the person allegedly acting pursuant to a discriminatory animus need not be the 'formal decisionmaker' to impose liability upon an employer for an adverse employment action, *so long as the plaintiff presents sufficient evidence to establish that the subordinate was the one 'principally responsible' for, or the 'actual decisionmaker' behind, the action.*" *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 288-89 (4th Cir. 2004) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151-52 (2000)) (emphasis added), *cert. dismissed*, 543 U.S. 1132 (2005). Such a showing was neither made by the EEOC, nor required by the court below.

Although Peters questioned whether his remark was sufficient to constitute actionable insubordination, the district court found, and the Tenth Circuit agreed, his comment "*can only be interpreted* as defiance . . . ." 450 F.3d at 492. Furthermore, as the district court correctly observed, "Peters' subjective belief whether he committed insubordination is not relevant." *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 2004 U.S. Dist. LEXIS 28277, at *39 (D.N.M. June 10, 2004), *rev'd*, 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007); *see also Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1196-97 (10th Cir. 2006) ("It is the perception of the decisionmaker which is relevant, not plaintiff's perception of himself") (citation omitted).

It is well-established that "Title VII charges neither this Court nor the jury to act as a 'super personnel department' that second guesses employers' business judgments." *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1203 (10th Cir. 2006); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981); *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1197 (10th Cir. 2006). As the Eleventh Circuit correctly observed:

> [A] defendant may terminate an employee for a good or bad reason without violating federal law. We are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision. Therefore, even if the Commissioners did in fact merely "rubber-stamp" [the challenged employment decision], this alone is insufficient to show pretext for discrimination. This is not a case in which a plaintiff has created a jury issue with respect to discrimination on the part of a dominant decision-maker whose decision was rubber-stamped by others.

Wascura v. City of S. Miami, 257 F.3d 1238, 1247 (11th Cir. 2001) (internal quotations and citations omitted).

Whether or not the court below agreed with the wisdom of Edgar's decision, the question before it was whether the EEOC produced any evidence proving Edgar's stated reason was pretext, *i.e.*, not merely "business error" but rather "deceit used to cover [her] tracks." *Millbrook*, 280 F.3d at 1175. "Perhaps this investigation was less than optimal, and conceivably it fell short in some respects, leaving stone[s] unturned. However, Defendant's investigation need not be perfect." *Haughton v. Orchid Automation*, 2006 U.S. App. LEXIS 29068, at *23 (6th Cir. 2006) (internal quotation and citation omitted). As this Court has observed repeatedly, "[t]he broad, overriding interest [of Title VII], shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions. . . . The statute was not intended to diminish traditional management prerogatives." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (internal quotations and citations omitted).

Even though the EEOC never was able to demonstrate that Edgar's reason for discharging Peters was false—indeed, Peters admitted making the remark that caused his discharge—the court nevertheless allowed the agency's claim to proceed to trial based simply on its own judgment that the company's investigation was deficient. It focused improperly on the quality of the employer's decisionmaking process, rather than on the veracity of its stated reason and, in effect, relieved the EEOC of its burden, under *McDonnell Douglas*, "'to demonstrate by competent evidence that the presumptively valid reasons for [the employment action] were in fact a coverup for a racially discriminatory decision.'" *Haughton v. Orchid Automation*, 2006 U.S. App. LEXIS 29068, at *17 (quoting *McDonnell Douglas*, 411 U.S. at 805). Because the decision below impermissibly conflicts with the standard of proof articulated by this Court in *McDonnell Douglas*, it should be reversed.

II. REQUIRING EMPLOYERS TO EXAMINE THE MOTIVES OF EVERY INFORMANT OF POSSIBLE MISCONDUCT WOULD UNDERMINE EFFORTS TO PROACTIVELY INVESTIGATE AND RESOLVE SUCH INCIDENTS

Large employers often delegate initial investigations of workplace misconduct to local human resources personnel, who in turn report their findings to a more senior manager who may work in a different city or state. Often, the individual making the employment decision is not the same person who conducted the initial investigation. A rule requiring employers to question the motives of every person who reports wrongdoing so as to rule out any potential underlying bias would be hugely burdensome on such employers and invariably would undermine their efforts to proactively investigate and resolve incidents of workplace misconduct. It would divert attention away from the actual incident being investigated, and would encourage employers to embark on fishing expeditions to uncover any and all possible workplace bias, whether or not such bias is directly related to the underlying investigation.

A conscientious employer has both an incentive and an affirmative obligation to respond appropriately to complaints of workplace bias. Indeed, as this Court observed in *Faragher v. City of Boca Raton*:

> Although Title VII seeks to make persons whole for injuries suffered on account of unlawful employment discrimination, its 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm . . . . It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of supervisory

> power would be at odds with the statutory policy if it failed to provide employers with some such incentive.

524 U.S. 775, 805-06 (1998) (internal quotations and citations omitted); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context") (citation omitted).

Courts should not prevent employers from taking action in response to clear misconduct based on the remote possibility an informant harbors a discriminatory animus in the absence of more than a mere theoretical nexus between the alleged bias and the employment decision. This is particularly true where, as here, the employee facing disciplinary action *never once* previously complained of alleged bias on the part of the subordinate employee.

It stands to reason that if the discriminatory actions of a low-level supervisor are so pronounced that they could infect an innocent, third party's decisionmaking process, a reasonable employee would bring the supervisor's misconduct to the employer's attention. Employers who have meaningful complaint procedures in place should not be penalized for failing to investigate potential bias where the alleged victim failed to take advantage of those procedures. Punishing an employer whose decisionmaker harbored no discriminatory animus and had no reason to suspect bias on the part of a non-decisionmaking subordinate would eliminate any incentive a plaintiff might otherwise have for reporting alleged discrimination, and thus would frustrate the primary aims and purpose of Title VII.

III. SUBJECTING EMPLOYEES REPORTING MISCONDUCT TO "BIAS" EXAMINATIONS WOULD CREATE A CHILLING EFFECT ON THEIR WILLINGNESS TO MAKE LEGITIMATE COMPLAINTS AND THUS WOULD DISCOURAGE CONSISTENT APPLICATION OF WORKPLACE RULES

Employers generally do not know why individuals report suspected wrongdoing. Many companies—particularly those who employ large numbers of employees and/or have facilities in many different states—often receive information regarding potential employee wrongdoing from various sources, including confidential "tip" lines and reports from other employees. Indeed, many companies encourage their employees to report alleged misconduct, such as harassment or other forms of discrimination, by such means.

Unfortunately, however, it often is difficult to persuade employees to come forward with reports of suspected wrongdoing or to participate in investigations of workplace misconduct. This reluctance may be due to several factors, such as fear of retaliation by the accused wrongdoer or general aversion or apathy towards participating in the investigative process. If already reluctant employees knew that by reporting alleged wrongdoing they would potentially be exposing themselves to an investigation into their own motives, they would be even less likely to step forward. This result could occur not only in discrimination cases, but also in situations involving other types of employee misconduct, such as fraud, theft or violence at work.

As a practical matter, a rule that effectively discourages individuals from reporting suspected wrongdoing would result in employers learning about far fewer problems at work, and thus having less of an opportunity to correct those problems and prevent future occurrences. Not only would such a result be at odds with the aims and objectives of Title

VII, it would lead ultimately to less productive and emotionally healthy workplaces.

CONCLUSION

For all of the foregoing reasons, we respectfully request that this Court reverse the lower court's ruling and affirm the decision of the district court.

Respectfully submitted,

RAE T. VANN
Counsel of Record
MCGUINESS, NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

No. 06-341

IN THE

Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY
OF LOS ANGELES,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FOOD MARKETING INSTITUTE IN SUPPORT OF PETITIONER

Of Counsel:

THOMAS J. WALSH, JR.
FORD & HARRISON LLP
795 Ridge Lake Boulevard
Suite 300
Memphis, TN 38120-9475
(901) 291-1500

ROBERT D. HALL, JR.
Counsel of Record
EDMUND J. MCKENNA
FORD & HARRISON LLP
101 East Kennedy Boulevard
Suite 900
Tampa, FL 33602-5133
(813) 261-7800

Counsel for Amicus Curiae

206810

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
The Standard Should Focus On Whether There Was Intentional Discrimination By The Authorized Decisionmaker, Including Whether There Was Either An Abdication Of Decisionmaking Responsibility To A Biased Subordinate Or A Deliberate Indifference To Possible Bias Where The Decisionmaker Knew Or Reasonably Should Have Known There Was A Substantial Likelihood Of Underlying Bias.	4
A. The Focus Should Be On the Actual Decisionmaking Agent.	6
B. Independent Investigations Should Not Be Widely Required.	10
C. Absent the Actual Decisionmaker's Own Bias, the Employer's Liability Should Turn on a Showing of Intentional Discrimination due to "Deliberate Indifference" to Underlying Bias of which the Decisionmaker Knew or Reasonably Should Have Known.	13
CONCLUSION	18

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Ambramson v. William Patterson Coll. of N. J., 260 F.3d 265 (3d Cir. 2001) 10

Bender v. Hecht's Department Stores, 455 F.3d 612 (6th Cir. 2006) 14

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) 6, 7, 14, 15, 19

City of Canton v. Harris, 489 U.S. 378 (1989) 14

EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476 (10th Cir. 2006) 4, 5, 13

Eiland v. Trinity Hosp., 150 F.3d 747 (7th Cir. 1998) 10

Elrod v. Sears, Roebuck and Co., 939 F.2d 1466 (11th Cir. 1991) 11, 14

English v. Colorado Dep't of Corr., 248 F.3d 1002 (10th Cir. 2001) 8, 13

Forrester v. Rauland-Borg Corp., 453 F.3d 416 (7th Cir. 2006) 11, 14

Gee v. Principi, 289 F.3d 342 (5th Cir. 2002) 7, 10

Cited Authorities

	Page
Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277 (4th Cir. 2004) (*en banc*)	9
Jamison v. Wiley, 14 F.3d 222 (4th Cir. 1994)	14
Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220 (10th Cir. 2000)	7, 13
Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999)	7
Neiderlander v. American Video Glass Co., 80 Fed. Appx. 256, 2003 U.S. App. LEXIS 22745 (3d Cir. 2003)	17
Ottman v. City of Independence, 341 F.3d 751 (8th Cir. 2003)	14
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)	7
Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000)	6, 8, 17, 19
Russell v. McKinney Hosp. Venture, 235 F.3d 219 (5th Cir. 2000)	8
Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990)	7-8

Cited Authorities

Page

Stacks v. Southwestern Bell Yellow Pages, 27 F.3d 1316 (8th Cir. 1994) 10

Stimpson v. City of Tuscaloosa, 186 F.3d 1328 (11th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000) .. 8, 9

Waters v. Churchill, 511 U.S. 661 (1994) 16, 17

Willis v. Marion County Auditor's Office, 118 F.3d 542 (7th Cir. 1997) 12

FEDERAL STATUTES

42 U.S.C.§ 1983 14

42 U.S.C. §§ 2000e *et seq.* ("Title VII") 1, 4

42 U.S.C. § 2000e-2(a) 6

42 U.S.C. § 2000e(b) 6

MISCELLANEOUS

EEOC report on "Federal Sector Investigations Time and Cost" 12

INTEREST OF AMICUS CURIAE

The Food Marketing Institute (FMI), headquartered in Virginia, conducts programs in research, education, industry relations, and public affairs on behalf of 1,500 member food retail and wholesale companies. Its members operate approximately 26,000 retail food stores and include multi-store chains. In this context of decentralized retail operations, FMI provides programs and information on human resources ("HR") management, recruitment and retention, training and development, diversity, and compensation and benefits. FMI submits this brief in support of Petitioner BCI Coca-Cola Bottling Company of Los Angeles because FMI's members wish to understand and effectively implement all non-discrimination and equal opportunity laws and principles in the workplace, and are faced with conflicting court interpretations on "cat's paw" liability for HR decisions.[1]

The standard the Tenth Circuit propounds in this case, as to whether any report or matter considered by an HR decisionmaker came from a biased source and "caused" the HR professional's decision, will generate uncertainty in daily workplace decisions. It will also significantly expand the liability of employers who, in the spirit of Title VII, 42 U.S.C. §§ 2000e *et seq.*, seek to provide an unbiased decisionmaking process. This is not what Congress intended. Similarly, requiring employers routinely to conduct independent investigations in order to avoid "cat's paw" liability would

---

[1] No counsel for a party authored any part of this brief and no person or entity other than FMI, its members, or its counsel made any monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this brief and their consent letters are being lodged herewith.

far exceed what Title VII requires and would demand resources which are simply unavailable and unworkable.

This Court should formulate a clear and consistent rule that comports with Title VII's protection against intentional discrimination by the employer, and that encourages the development of policies and procedures which deter discrimination. Employers should be judged on whether their authorized decisionmakers intentionally discriminate, not on allegations that something in the process may have unknowingly affected a decision by an authorized and unbiased HR professional.

SUMMARY OF ARGUMENT

Based on Title VII's statutory language and on principles which this Court has set forth in prior rulings in Title VII and analogous cases, FMI urges this Court to adopt the following rule:

Liability for an adverse employment decision under Title VII should only attach where the plaintiff can meet his or her burden of proving that the adverse employment decision was the result of intentional discrimination, specifically, because the *actual decisionmaker* either (1) personally acted out of discriminatory intent; or (2) knew or reasonably should have known that there was a substantial likelihood of discrimination and was deliberately indifferent to such bias. The actual decisionmaker may be a decisionmaker formally authorized by the employer or one to whom the formally authorized decisionmaker has effectively delegated to another the authority to decide. Whether deliberate indifference exists should be measured by the actual decisionmaker's course of action in making

the decision once he or she actually knew or should have known that what was reported was likely infected with discriminatory bias.

In enacting Title VII, Congress intended to protect employees from intentional discrimination by an "employer." This requires the plaintiff to prove intentional discrimination and a judicial factfinder to view facts as they appeared to the authorized decisionmaker at the time the decision was made.

An employer's decision to limit the authority to take tangible employment actions to trained, unbiased officials serves Title VII's deterrent purposes. Consistent with this Court's holdings, "cat's paw" liability should be very limited. By permitting honest but incorrect decisions, Title VII precludes requiring (as the Tenth Circuit's rule would do) the employer to prove that it conducted an independent investigation in virtually every case in order to avoid "cat's paw" liability. In many circumstances, an independent investigation is unnecessary for an independent evaluation and decision, and the cost of having to conduct such an investigation for all personnel decisions would be prohibitive. Imposing such a requirement gives insufficient weight to the employer's legitimate interest in efficient decisionmaking, an interest this Court has recognized in analogous situations.

ARGUMENT

THE STANDARD SHOULD FOCUS ON WHETHER THERE WAS INTENTIONAL DISCRIMINATION BY THE AUTHORIZED DECISIONMAKER, INCLUDING WHETHER THERE WAS EITHER AN ABDICATION OF DECISIONMAKING RESPONSIBILITY TO A BIASED SUBORDINATE OR A DELIBERATE INDIFFERENCE TO POSSIBLE BIAS WHERE THE DECISIONMAKER KNEW OR REASONABLY SHOULD HAVE KNOWN THERE WAS A SUBSTANTIAL LIKELIHOOD OF UNDERLYING BIAS.

The Tenth Circuit's decision in *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006), significantly enlarges the scope of employer liability under Title VII, 42 U.S.C. §§ 2000e *et seq.*, for personnel decisions HR officials make every day. Congress did not intend this result when it enacted Title VII.

In *BCI* the company sought to comply with the law by authorizing a trained HR official, rather than lower level persons, to make termination decisions. The HR official, who "alone, made the formal termination decision" clearly was not biased against the plaintiff, as she "did not even know that he was black." *Id.* at 491.

Viewing the facts as they appeared to the HR official at the time, as the law requires be done, there was no reason whatsoever for the sole decisionmaker to suspect race discrimination or to launch an independent investigation. Yet the court ordered the case to trial because the HR official, who (quite logically) saw no need to conduct an independent

investigation, relied on a report from a subordinate who was later portrayed in the lawsuit as biased. The court so held even though the subordinate "was not authorized to discipline or terminate anyone." *Id.* at 478.[2]

The consequence of the Tenth Circuit's rule, if upheld, would be that a responsible HR decisionmaking official could no longer ask in an honest and straightforward manner what logical conclusions he or she as an experienced professional should draw from the circumstances presented, as the law now requires. Rather, the official would have a legal duty to ask affirmatively whether the employee belongs to any of several protected categories, and if so, then to probe further whether anyone could allege bias against one or more reporting subordinates.

This means that the HR official must be prepared to go to the time and expense of a full independent investigation before every decision, even absent any reason to suspect discrimination.[3] If the HR official chooses instead to rely on what is reported in the ordinary course of business, the official

---

[2] Notably, if the HR official *had* gone to the time and expense of an independent investigation and had interviewed the plaintiff-employee, there would have been, as there very often are, disputes as to the report of the alleged insubordinate conversation in question. Thus, regardless of any independent investigation, upon a decision to terminate, under the Tenth Circuit rule the plaintiff could nevertheless claim that the subordinate's report "caused" the termination.

[3] For example, the HR official would have to probe each item considered: Is this report accurate and unbiased? What about the prior disciplinary action in the file? What about that evaluation? What do other co-workers, even those uninvolved in the situation, think of the reporting subordinate?

runs the risk that a judge or jury will second-guess this approach based on factors unknown to the decisionmaker at the time — undisclosed matters such as an employee's characteristics, bias allegations, and other circumstances. Also, if the responsible HR official personally interviews the charged employee but deems the reporting employee more credible as to disputed facts, the official must face the unsettling reality that a jury will actually decide that question.

For a relatively small company with limited resources, or a large one with thousands of employees, these requirements would present a heavy burden. They are inconsistent with Title VII, and they would generate huge costs, much uncertainty, and unwarranted liability.

A. The Focus Should Be On the Actual Decisionmaking Agent.

Under Title VII, the prohibition against intentional employment discrimination runs against "an employer," 42 U.S.C. § 2000e-2(a), defined to include "any agent," § 2000e(b). The plaintiff has the ultimate burden of proving that the employer intentionally discriminated against the plaintiff. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). As this Court held in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), a "tangible employment action in most cases inflicts direct economic harm." *Id.* at 762. Generally, only a "person acting with the authority of the company [] can cause this sort of injury," because a "tangible employment decision requires an official act of the enterprise, a company act." *Id.*

Typically, an allegation of a discriminatory tangible employment action calls into question the motives of the

person the company authorized to make the decision. "[A] challenge of pretext requires us to look at the facts as they appear to the person making the decision to terminate plaintiff." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231 (10th Cir. 2000). The "focus is on the final decisionmaker" because the "statements and actions of ordinary employees are normally not imputable to the employer." *Gee v. Principi*, 289 F.3d 342, 346 (5th Cir. 2002), following *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) ("statements by nondecisionmakers . . . [do not] suffice to satisfy the plaintiff's burden . . .").

As this Court has recognized, Title VII is designed to encourage the creation of anti-discrimination policies and procedures, and to the extent limiting employer liability encourages employees to report problems through the use of such procedures, such a limitation of liability serves Title VII's deterrent purpose. *Ellerth*, 524 U.S. at 764. Agency concepts must be adapted to Title VII's practical objective of encouraging employers to implement policies to prevent discrimination. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 544-545 (1999). Thus an employer's policy of allowing only trained, unbiased HR professionals to take tangible employment actions is one that effects the deterrent purpose of the statute and should be encouraged.

However, as noted in *Ellerth*, procedures for review of decisions by higher level supervisors may nevertheless result in "cat's paw" liability where the responsible decisionmaker abdicates his responsibility, such as by serving only as a "rubber stamp," as in the cited case of *Shager v. Upjohn Co.*,

913 F.2d 398, 405 (7th Cir. 1990).[4] In *Shager*, the review committee's considerations of a recommended termination were so "brief, perhaps perfunctory" that no one even remembered having considered the decision. *Id.* at 405. Similarly, in *Reeves*, judgment as a matter of law for the employer was denied where the subordinate's recommendation was "principally responsible" for the decision and he was the "actual decision-maker," married to the formal decision-maker. *Reeves*, 530 U.S. at 151-152.[5]

A number of courts have articulated the "cat's paw" test as requiring at least a recommendation by a biased subordinate, which the decisionmaker followed. *See, e.g., Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000); *English v. Colorado Dep't of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001). Where there is a recommendation, an issue remains as to the degree of independent evaluation by the decisionmaker and the weight he or she accorded the recommendation. In addition, the plaintiff should still have

---

[4] The opinion below cites the *Shager* opinion by Judge Posner as the inaugural "cat's paw" decision.

[5] Some of the confusion and division over the proper standard, which the Tenth Circuit perceived, stems from excessive focus on *terminology* in other decisions, rather than on *de facto* decisionmaking status. For example, the Tenth Circuit rejected as too lenient the approach which the Fifth Circuit adopted in *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000), which referred to whether the subordinate "possessed leverage, or exerted influence, over the titular decisionmaker." *Id.* at 227. In *Russell*, however, the subordinate actually "was the *de facto* decisionmaker," the CEO's son who took advantage of that power, telling the plaintiff she would lose her job over friction, then later issuing an ultimatum to the formal decisionmaker to terminate her. *Id.* at 228.

to prove that "the discriminatory animus behind the recommendation, and not the underlying employee misconduct identified in the recommendation," caused the decision. *Stimpson*, 186 F.3d at 1332. But where (as here) there is no recommendation, there is no evidence that the subordinate desired or supported the action taken and no basis to impute the decision to the subordinate.

In this case the Tenth Circuit correctly rejected a standard that would impute liability for merely reporting factual information, or providing input, or having influence that may have affected the decision. A subordinate who provides a report or input does not know, or have control over, what the actual decisionmaker will review, evaluate or decide. As held in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (*en banc*), the standard should focus on actual decisionmakers. The court reasoned that there is no precedential or practical basis "to expand the contours of the acts – by embracing a test that would impute the discriminatory motivations of subordinate employees having no decisionmaking authority to the employer . . . simply because they have influence or even substantial influence in effecting a challenged decision." *Id.* at 291.[6]

At issue here is whether the employer is guilty of intentional discrimination where the authorized decisionmaker deliberated and decided in an unbiased manner. The standard properly should focus on persons authorized to act as decisionmakers, and who in fact evaluate and decide the matter. In this situation, if the subordinate

---

[6] In *Hill*, the fact that the subordinate was in the position to make reports and initiate the decisionmaking process was held insufficient. *Hill*, 354 F.3d at 297.

does not make, or participate in, actual decisionmaking, but rather only reports information without making the decision on how it will be used or what else will be considered, the employer's decision is not intentionally discriminatory, and liability should not be imputed from an alleged biased report.[7] Where, as in the case below, the authorized decisionmaker did not abdicate her responsibility and rendered an honest, unbiased decision, liability should not be imputed from reports of subordinates based on a "cause" theory.

B. Independent Investigations Should Not Be Widely Required.

The concept discussed by the Tenth Circuit that an employer must prove that an independent investigation was conducted to avoid "cat's paw" liability conflicts with well established Title VII principles on the plaintiff's burden of proof. Thus, for example:

> [A]s we have said countless times, the question in a discrimination case is not whether the employer's stated nondiscriminatory ground for the action of which the plaintiff is complaining is correct but whether it is the true ground of the

---

[7] *Compare Eiland v. Trinity Hosp.*, 150 F.3d 747, 752-53 (7th Cir. 1998) (decisionmaker "honestly believed her reasons") *with Ambramson v. William Patterson Coll. of N. J.*, 260 F.3d 265, 286 (3d Cir. 2001) (decisionmaker sought counsel of subordinate in making decision who "participated in the decision to terminate"); *Stacks v. Southwestern Bell Yellow Pages*, 27 F.3d 1316, 1323 (8th Cir. 1994) (subordinate "admitted that he participated in the decisions to suspend and terminate"); *Gee*, 289 F.3d at 347 & n.4 (negative comments in meeting created a general consensus and resulted in a decision that "was already made").

> employer's action rather than being a pretext for a decision based on some other, undisclosed ground.

Forrester v. Rauland-Borg Corp., 453 F.3d 416, 417 (7th Cir. 2006) (Posner, J.). Thus, the Seventh Circuit noted that if the complaint against the plaintiff "had been a pure fabrication, with 'no basis in fact' whatsoever – yet it was believed by the employer and it was that belief and nothing else that caused him to fire the plaintiff . . . [t]here would be nothing pretextual about his action. A pretext, to repeat, is a deliberate false-hood." *Id.* at 419. *See also Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) ("We can assume for purposes of this opinion that the complaining employees interviewed by Rives were lying through their teeth. The inquiry . . . is limited to whether Rives, Malone and Merrill believed that Elrod was guilty of harassment, and if so, whether this belief was the reason behind Elrod's discharge.").

An independent investigation is, of course, evidence of an independent evaluation and decision by the decisionmaker. That does not mean, however, that the considerable time and expense of an independent investigation is required to render an independent decision. For example, evaluations may often involve a review of objective file data (absences, tardies, prior discipline) and rules without the need for an independent investigation and interviews.

Where complaints of discrimination against a subordinate already have been made by the time of the decision, an independent investigation, including an interview of the employee, provides evidence of an independent evaluation in the face of the discrimination

allegations. *See Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547-548 (7th Cir. 1997) (decisionmaker knew of discrimination charges and independently reviewed final violation). However, even in that circumstance, the lack of an independent investigation does not mean that an independent decision was not reached, where the alleged biased subordinate is not a *de facto* decisionmaker and did not participate in the decision.

Looking at it through the eyes of an HR decisionmaker as required, in the absence of complaints or allegations of discrimination against a reporting subordinate, there would be no apparent need for investigation to ascertain the possibility of bias. Independent investigations for all reports requiring personnel action would obviously involve tremendous expenditures of time and money. For example, in the Equal Employment Opportunity Commission's (EEOC) report on "Federal Sector Investigations Time and Cost," the EEOC reports that over an 11-year period, the cost for federal agencies to conduct investigations of federal sector equal employment opportunity complaints was $387.5 million, with an average cost of $2,418 per investigation. Extending such costs to all reported matters, even where no EEO complaint or discrimination allegation against a subordinate has been made, is completely unwarranted and beyond any conceivable requirement of Title VII.

Moreover, conducting an independent investigation would not avoid litigation and possible liability under the Tenth Circuit's "cause" standard. The Tenth Circuit approach would allow the plaintiff-employee to pursue a theory that a mere "report" which is discriminatory (not rising to the level of a recommendation, which the Tenth Circuit held unnecessary for liability to attach) "caused the adverse

employment action," *BCI*, 450 F.3d at 487, because a biased subordinate was guilty of "selectively reporting or even fabricating information in communications with the formal decisionmaker," *id.* at 486. While the Tenth Circuit stated that an employer can avoid liability by conducting an independent investigation or simply asking an employee for his version of events, the cases cited by the Tenth Circuit involved only situations where the employee refused the opportunity to respond in the investigation, precluding him from later challenging his employer's reliance on reported information.[8] Thus, the Tenth Circuit's "cause" standard would nevertheless appear to allow claims for liability to proceed even where an independent investigation was conducted, if the employee responded and simply disputed the underlying reports as biased and fabricated.

C. Absent the Actual Decisionmaker's Own Bias, the Employer's Liability Should Turn on a Showing of Intentional Discrimination due to "Deliberate Indifference" to Underlying Bias of which the Decisionmaker Knew or Reasonably Should Have Known.

Where there is a procedure for the HR official to consider the reported information and to make an honest decision upon his/her belief as to what is warranted, a plaintiff-employee should not be able to circumvent that decision simply by

---

[8] *See Kendrick, supra* (no "cat's paw" liability where center manager investigated incident and plaintiff declined opportunity to give his version prior to discharge by HR manager based on report); *English v. Colorado Dept of Corr.*, 248 F.3d 1002 (10th Cir. 2001) (no "cat's paw" liability for biased investigation where decision-making official held meetings with plaintiff who refused the opportunity to respond and rebut).

later alleging that it was "caused" by a subordinate's biased report. As this Court recognized in *Ellerth*, conduct taken for personal motives is not subject to *respondeat superior* liability. *Ellerth*, 524 U.S. at 757, 759 (*citing, Jamison v. Wiley*, 14 F.3d 222, 237 (4th Cir. 1994) (unfair criticism of job performance by supervisor resulted from personal motives and was not subject to *respondeat superior* liability)).

In other civil rights contexts, where *respondeat superior* liability is not applicable to impute liability for a subordinate's action, a supervisor incurs liability for a violation where the supervisor is personally involved in a violation or "deliberately indifferent" to whether a violation occurred. *See Ottman v. City of Independence*, 341 F.3d 751, 761 (8th Cir. 2003) (supervisor was not deliberately indifferent to claim of sexual harassment where he met with alleged perpetrator, even if his actions proved ineffectual).[9]

---

[9] This Court formulated the "deliberate indifference" standard in *City of Canton v. Harris*, 489 U.S. 378, 388-389 (1989), where *respondeat superior* liability was inapplicable under 42 U.S.C. § 1983, the employer had valid policies, and liability depended on a deliberate action by the employer resulting in the violation of rights of persons dealing with its employees. This Court developed the standard to avoid unprecedented liability, whereby, in virtually every instance, a plaintiff would be able to point to something further that could have been done and courts would engage in endless exercises of second-guessing. Similarly, under Title VII, employer liability for the decision depends on whether it was intentional discrimination and a deliberate falsehood; *see Forrester*, 453 F.3d at 419, and the law is well established that courts may not act as "super personnel departments" and second guess business decisions. *See, e.g., Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 628 (6th Cir. 2006); *Elrod*, 939 F.2d at 1470.

Likewise, in *Ellerth*, this Court held that when a supervisor takes no tangible employment action but there is an issue that the supervisor engaged in discriminatory conduct (there, harassment), the employer can defend against that discrimination by showing that it exercised reasonable care, such as promulgation of an anti-discrimination policy and complaint procedure, and that the employee unreasonably failed to take advantage of the procedure. *Ellerth*, 524 U.S. at 765. Employer liability is triggered when the employer "knew or should have known about the conduct" and failed to stop it. *Id.* at 759.

Anti-discrimination policies with complaint procedures are common among thousands of American businesses and governmental agencies. In these circumstances, employees have the ongoing opportunity to raise any concerns they have about possible discrimination. Absent discrimination allegations against the reporting subordinate which were "known or should have [been] known," and absent deliberate indifference by the decisionmaker, there is no basis to suggest that an evaluation and decision by an HR professional was a deliberate act of intentional discrimination of the employer.

Where a company provides valid anti-discrimination policies and complaint procedures and limits authorized decisionmaking to responsible professionals, a subsequent allegation of a reporting subordinate's bias unknown to the company when making the decision should not be used to impute liability to the company. Rather, such policies and procedures should be encouraged because they serve Title VII's deterrent purpose. Liability to the employer for intentional discrimination should be imputed only where the formal decisionmaker abdicates his or her responsibility or is deliberately indifferent to whether bias exists where he or

she knew or should have known of the likelihood of bias in the process.

In *Waters v. Churchill*, 511 U.S. 661, 668 (1994), a First Amendment protected speech case, at issue were disputed versions of the plaintiff's statements, which were reported to be negative toward the administration and which led to the plaintiff's discharge. This Court vacated the Seventh Circuit's holding that if the employer discharges the employee as a result of an insufficient investigation as to whether the speech was protected, "the employer runs the risk of eventually being required to remedy any wrongdoing whether it was deliberate or accidental." *Id.* at 667-668 (citations omitted). This standard gave "insufficient weight to the government's interest in efficient employment decisionmaking." *Id.* at 675. As the Court recognized:

> [E]mployers, public and private, often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors that the judicial process ignores. Such reliance may sometimes be the most effective way for the employer to avoid future recurrences of improper and disruptive conduct. What works best in a judicial proceeding may not be appropriate in the employment context. If one employee accuses another of misconduct, it is reasonable for a government manager to credit the allegation more if it is consistent with what the manager knows of the character of the accused. Likewise, a manager may legitimately want to discipline an employee based on complaints by patrons that the employee has been rude, even though these complaints are hearsay.

Id. at 676.

This Court in *Waters* found that (unlike under Title VII) a government manager who honestly believes that speech is unprotected can nevertheless violate the First Amendment if the speech is protected. *Id.* at 669. The Court held that a manager could be held to the standard of "care that a reasonable manager would use before making an employment decision" in a situation where "**a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected.**" *Id.* at 677-678 (emphasis added). The Court emphasized that "many different courses of action will necessarily be reasonable" in situations where there could be reasonable disagreement about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion. *Id.* at 678.

As applied here,[10] first, *Waters* spoke of a duty of reasonable care being triggered where there was a reasonable basis for recognizing that there existed a "substantial likelihood" that legal protections (here, against bias) were in play. Second, under *Waters*, a violation could be based upon an unintentional, but erroneous and unreasonable belief. *Id.* at 678-679. Under Title VII, by contrast, the plaintiff has the ultimate burden of proving he or she has been the victim of "intentional discrimination." Rejection or disbelief of the employer's explanation does not itself suffice. Rather, the factfinder must believe the plaintiff's explanation of intentional discrimination in order for liability to attach. *Reeves*, 530 U.S. at 147. Accordingly, a Title VII plaintiff should have to show that the decision was the result of

---

[10] *See Neiderlander v. American Video Glass Co.*, 80 Fed. Appx. 256, 259, 2003 U.S. App. LEXIS 22745 (3d Cir. 2003), applying *Waters* in a Title VII case.

intentional discrimination because the unbiased decisionmaker (1) knew or reasonably should have known that there was a substantial likelihood of discrimination, and (2) was intentionally or deliberately indifferent to the likelihood of discrimination. The taking of any of the different courses of action available which could be considered reasonable where reasonable disagreement about an investigation exists would preclude liability.

As applied to the instant case, Ms. Edgar evaluated the matter and made the termination decision without any bias. Mr. Grado was not authorized to terminate and, while he made a report, he did not know, influence, or control what Ms. Edgar would review, evaluate, or decide. There had been no complaints that Mr. Grado was biased, and there was no reason for Ms. Edgar to suspect discrimination or to conduct an independent investigation. Ms. Edgar was not deliberately indifferent to whether bias occurred, as she did not know, nor could she have known, that the reporting subordinate was biased. Accordingly, there was no basis to find liability as to the company.

CONCLUSION

A test as to whether any report of an alleged biased subordinate "caused" the action would impute much uncertainty and unwarranted liability to an employer who provides an independent decisionmaking process. Similarly, any rule that effectively imposes a blanket requirement of an independent investigation goes far beyond what Title VII requires, which is simply an honest, even if incorrect, decision. HR professionals and their employers simply do not have the resources to conduct independent investigations

every time a decision needs to be made, and nothing in the law imposes such an extreme requirement. The Court should continue to focus, as it did in *Ellerth* and *Reeves*, on the actual decisionmaker and should not enlarge the contours of liability by making the employer responsible for any action that "caused" a decision independently rendered in an honest fashion. Consistent with Title VII's requirement of intentional discrimination and with principles this Court has set forth in prior cases, the plaintiff's burden should be to show that the decision was the result of intentional discrimination because either the decisionmaker abdicated the responsibility to make the decision to the subordinate, or there was a reasonable basis to question the report (as biased), and the decisionmaker was deliberately indifferent to that information.

Respectfully submitted,

ROBERT D. HALL, JR.
Counsel of Record
EDMUND J. MCKENNA
FORD & HARRISON LLP
101 East Kennedy Boulevard
Suite 900
Tampa, FL 33602-5133
(813) 261-7800

Of Counsel:

THOMAS J. WALSH, JR.
FORD & HARRISON LLP
795 Ridge Lake Boulevard
Suite 300
Memphis, TN 38120-9475
(901) 291-1500

Counsel for Amicus Curiae

479b

No. 06-341

IN THE

Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AARP, AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, ASIAN AMERICAN JUSTICE CENTER, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, NATIONAL WOMEN'S LAW CENTER, PICK UP THE PACE, AND PUBLIC JUSTICE CENTER, IN SUPPORT OF RESPONDENT

MICHAEL FOREMAN
Counsel of Record
JOHN C. BRITTAIN
DARIA E. NEAL
ZOE SEGAL-REICHLIN
SARAH CRAWFORD
ADAM STOFSKY
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Ave. NW
Suite 400
Washington, DC 20005
(202) 662-8600

MICHAEL B. DE LEEUW
DARCY M. GODDARD
GEORGINA COSTELLO
(*admission pending*)
VIVEK REDDY
SARAH HINCHLIFF
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP
One New York Plaza
New York, New York 10004
(212) 859-8000

Attorneys for Amici Curiae

March 27, 2007

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. TITLE VII'S PRIMARY PURPOSE IS TO ELIMINATE THE CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN EMPLOYMENT DECISIONS. 3

II. TITLE VII PROVIDES FOR EMPLOYER LIABILITY FOR THE BIASED ACTIONS OF ITS SUPERVISORS 6

A. Well-established general agency principles apply to Title VII. 6

B. Imputation of bias under Title VII is not properly limited to situations where the final decision-maker is biased. 7

C. A supervisor's actions may be imputed to an employer when they fall within the supervisor's "scope of employment" or actual authority 8

D. The "aided by agency" agency analysis addressed by the Court in *Faragher* and *Ellerth* is unnecessary here. 10

III. "MOTIVATING FACTOR" IS THE APPROPRIATE CAUSATION STANDARD FOR DETERMINING WHETHER A SUPERVISOR'S DISCRIMINATORY ACTIONS CAUSED AN ADVERSE EMPLOYMENT ACTION 12

A. A "motivating factor" causes, contributes to, or influences the employment decision 14

B. In addition to the explicit language of Title VII, ample case law justifies holding

TABLE OF CONTENTS —continued

employers liable where a supervisor's racial animus was a "motivating factor" in an unlawful employment practice. 17

1. Employer liability for supervisor bias has been endorsed by all the Circuit Courts of Appeals to have considered the issue. 17

2. An "influence" can be a cause and a motivating factor. 18

3. The Tenth Circuit's decision below is ultimately consistent with the "influence" or "motivating factor" analysis utilized by other Circuit Courts of Appeals 20

4. The Fourth Circuit, an outlier in these cases, fundamentally misapplied the causation principles under Title VII and ignored the clear language of the statute. 21

IV. IN PRACTICE, APPLICATION OF THE "MOTIVATING FACTOR" STANDARD OF CAUSATION WILL NOT INCREASE EMPLOYER LIABILITY FOR UNLAWFUL DISCRIMINATION 22

V. IN EMPLOYMENT DISCRIMINATION CASES, EMPLOYER LIABILITY IS NECESSARILY BASED ON FACTUAL DETERMINATIONS, THUS A BRIGHT-LINE RULE CANNOT EFFECTUATE THE GOALS OF TITLE VII IN ALL WORKPLACES 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES **Page**

Abramson v. William Paterson College of New Jersey, 260 F.3d 265 (3d Cir. 2001) 17, 20

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 5, 6

Bergene v. Salt River, 272 F.3d 1136 (9th Cir. 2001).....17, 18

Burlington Industrial Inc. v. Ellerth, 524 U.S. 742 (1998) ..... *passim*

Burlington Northern v. White, 126 S. Ct. 2405 (2002) 25

Christian v. Wal-Mart, 252 F.3d 862 (6th Cir. 2001).....19

Clark County School District v. Breeden, 532 U.S. 268 (2001) 12

Connecticut National Bank v. Germain, 503 U.S. 249 (1992) 13

Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987 (D. Minn. 2003).....13

Desert Palace v. Costa, 539 U.S. 90 (2003) ..... *passim*

EEOC v. BCI Coca Cola, 450 F.3d 476 (10th Cir. 2006).....18, 20, 21

English v. Colorado Department of Corrections, 248 F.3d 1002 (10th Cir. 2001).....17

Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344 (6th Cir. 1998) 17, 19, 25

TABLE OF AUTHORITIES — continued

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) ..... *passim*

Franks v. Bowman Transport Co.,
424 U.S. 747 (1976) 5

Griffin v. Washington Convention Center,
142 F.3d 1308 (D.C. Cir. 1998) 17, 19

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 5

Harris v. L & L Wings,
132 F.3d 978 (4th Cir. 1997) 23

Hill v. Lockheed Martin,
354 F.3d 277 (4th Cir. 2004) ..... *passim*

Hutson v. McDonnell Douglas Corp.,
63 F.3d 771 (8th Cir. 1995) 26

Kolstad v. American Dental Association,
527 U.S. 526 (1999) 9, 23

Levias v. Texas Department of Criminal Justice,
352 F. Supp. 2d 751 (S. D. Tex. 2004) 13

Long v. Eastfield College,
88 F.3d 300 (5th Cir. 1996) 17

Lust v. Sealy,
383 F.3d 580 (7th Cir. 2004) 20

McDonald v. Santa Fe,
427 U.S. 273 (1976) 24

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) ..... *passim*

Meritor Sav. Bank, FSB v. Vinson,
477 U.S. 57 (1986) 25

Oncale v. Sundown Offshore Services, Inc.
523 U.S. 75 (1998) 25

TABLE OF AUTHORITIES — continued

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) ..... *passim*

Raad v. Fairbanks North Star Borough School District, 323 F.3d 1185 (9th Cir. 2003) 18

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 13

Russell v. McKinney Hospital Venture,
235 F.3d 219 (5th Cir. 2000) 19, 25

Santiago-Ramos v. Centennial,
217 F.3d 46 (1st Cir. 2000) 17, 19

Sauers v. Salt Lake County,
1 F.3d 1122 (10th Cir. 1993) 11

Shager v. Upjohn Co.,
913 F.2d 398 (7th Cir. 1990) 9

Stacks v. Southwestern Bell Yellow Pages, Inc.,
27 F.3d 1316 (8th Cir. 1994) 17

Stallings v. Hussmann Corp.,
447 F.3d 1041 (8th Cir. 2006) 26

Stegall v. Citadel Broadcasting Co.,
350 F.3d 1061 (9th Cir. 2003) 18

Stimpson v. City of Tuscaloosa,
186 F.3d 1328 (11th Cir. 1999) 17

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 24

United States v. N.L. Industrial, Inc.,
479 F.2d 354 (8th Cir. 1973) 5

United Steelworkers v. Weber,
443 U.S. 193 (1979) 4

Willis v. Marion County Auditor's Office,
118 F.3d 542 (7th Cir. 1997) 17

TABLE OF AUTHORITIES — continued

STATUTES AND LEGISLATIVE MATERIALS

42 U.S.C. § 2000e-2(m) 4, 5, 24

42 U.S.C. § 2000e-2(a) 12

42 U.S.C. § 2000e-2(a)(1) 14, 15, 18

42 U.S.C. § 2000e-2(e) 3

42 U.S.C. § 2000e-5(g)(2) 16, 23

42 U.S.C. § 2000e(b) 6

42 U.S.C. §§ 12101, *et seq.* 1

110 CONG. REC 2728, 13837 (1964) 15

H.R. Rep. No. 102-40(I), at 48 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 586 15

ARTICLES

Lauren B. Edelman, Howard S. Erlanger, & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, LAW & SOC'Y REV., Volume 27 26

Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 506 (2006) 20

John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 AM. SOC. REV. 794, 800 26

TABLE OF AUTHORITIES — continued

RESTATEMENTS

RESTATEMENT (SECOND) OF AGENCY
§ 219 (1957) ..... *passim*

RESTATEMENT (SECOND) OF AGENCY
§ 229 (1957) 9

RESTATEMENT (THIRD) OF AGENCY
§ 7.07 (2006) 8

INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law, AARP, American Association of People with Disabilities, Asian American Justice Center, National Association for the Advancement of Colored People, National Partnership for Women & Families, National Women's Law Center, Pick Up The Pace, and Public Justice Center respectfully submit this brief as *amici curiae* in support of Respondent pursuant to Supreme Court Rule 37.3(a), on the consent of the parties. *Amici* are interested in furthering the goal of Title VII of the Civil Rights Act of 1964 to eradicate employment discrimination.[1]

The Court's decision here will determine the scope of Title VII's power to combat illegal discrimination and will directly affect the rights of employees who suffer adverse employment action on the basis of race, sex, religion, national origin, or ethnicity. As such, this case directly impacts the constituencies served by the *amici*.[2]

Fuller statements of interest for all *amici* are included in the appendix to this brief.

---

[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3.

[2] Title VII provides the model for proving discrimination claims under other federal anti-discrimination laws, including the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* Thus, the Court's resolution of this case has implications for many employees who are not protected by Title VII but who experience circumstances of bias, like those at issue here, on other grounds.

SUMMARY OF ARGUMENT

This case provides the Court with an opportunity to clarify in case law what Congress has made clear in Title VII: an employer can be held liable for the bias of a supervisor if the bias was a motivating factor for an employment practice.

Under the 1991 amendments to Title VII, a plaintiff establishes an unlawful employment practice by demonstrating that race, color, religion, sex, or national origin was a "motivating factor" for any employment practice, even though other factors also motivated the practice. *Amici* ask the Court to hold that an employer can be held liable under the express language of Title VII for the bias of a supervisor, even when the ultimate decision-maker harbored no discriminatory motive toward the affected employee. In sum, an employer can—and should—be held liable whenever race or another prohibited criteria was a "motivating factor" in an employment decision, provided that applicable agency requirements are met.

Clarifying this principle will further Title VII's primary purpose to eliminate consideration of race, religion, sex, ethnicity, or national origin from employment decisions. Title VII tolerates no discrimination on these bases, subtle or otherwise.

Well-established agency principles impute to an employer the actions of an employee committed within the scope of employment, or those that are "aided by" the agency relationship. Accordingly, an employer may be held liable for acts committed by biased supervisors if such actions result in an adverse employment practice against an employee in a protected class. Contrary to Petitioner's argument (Pet. Br. At 21-24), a finding of agency does not hinge on whether the biased supervisor is the ultimate decision-maker.

Application of this standard will not increase employer liability for unlawful discrimination.

ARGUMENT

I. TITLE VII'S PRIMARY PURPOSE IS TO ELIMINATE THE CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN EMPLOYMENT DECISIONS.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989), Justice Brennan, writing for the plurality, stated:

> In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees... Congress' intent to forbid employers to take [any protected classification] into account in making employment decisions appears on the face of the statute.

With this observation, Justice Brennan articulated the primary purpose of Title VII. Title VII seeks to promote equal opportunity and eliminate race discrimination[3] by ensuring that an individual's membership in a protected class *never* factors into an employment decision.[4] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-01 (1973); 42 U.S.C. § 2000e–2(m).

This Court has recognized repeatedly that the central, driving, and primary purpose of Title VII is to eradicate

---

[3] Title VII forbids the consideration of race, color, religion, sex, or national origin as a factor in an employment decision. For ease of discussion this analysis will simply reference its application as being based upon "race" or being "racial" unless specifically noted.

[4] Unless, of course, Congress has specifically allowed its limited use, as when religion, sex or national origin is "bona fide occupational qualification . . . ." 42 U.S.C. § 2000e-2(e). Further, like the *Price Waterhouse* Court, "[w]e disregard, for purposes of this discussion, the special context of affirmative action." *Price Waterhouse*, 490 U.S. at 228, 229 n.3 (plurality opinion).

employment discrimination by removing race from the decision-making equation. In the seminal case *McDonnell Douglas Corp. v. Green*, for example, the Court observed that it is "abundantly clear that Title VII tolerates *no* racial discrimination, subtle or otherwise." 411 U.S. at 801 (emphasis added). In *Price Waterhouse*, the Court's plurality also spoke directly to this issue, explaining "[w]e take these words [of 42 U. S. C. §§ 2000e-2(a)(1)] to mean that gender [or any protected classification] must be irrelevant to employment decisions." 490 U.S. at 240. Justice Rehnquist later similarly acknowledged in his dissent in *United Steelworkers v. Weber* that "this language prohibits a covered employer from considering race when making an employment decision...." *United Steelworkers v. Weber*, 443 U.S. 193, 220 (1979) (Rehnquist, J., dissenting).[5]

The 1991 Amendment to Title VII, enacted in part in response to the Court's decision in *Price Waterhouse*,[6] confirmed Congress' intent to forbid employers from using race, sex, or any other protected classification as a "motivating factor" in an employment decision. 42 U.S.C. § 2000e-2(m). In *Price Waterhouse*, the plurality had found that, even where an employer improperly relied on race as a factor in making an employment decision, the employer could escape liability if it could prove that race was not the sole, or "but for," cause of the decision. 490 U.S. at 258. Rejecting the plurality's interpretation of Title VII, Congress amended the statute in 1991 to clarify that the statute *never*

---

[5] Although the Court in *United Steelworkers* ultimately found that employers *may* take race into account in the context of affirmative action programs redressing past discrimination, the future Chief Justice's argument that race should never be considered in an employment decision is still applicable in the non-affirmative action scenario.

[6] The Court acknowledged Congress' intent in enacting the 1991 Amendment in *Desert Palace v. Costa*, 539 U.S. 90, 94 (2003) ("[Section] 107 of the 1991 Act...'responded' to *Price Waterhouse*.").

tolerates the use of race as a factor in employment decisions. 42 U.S.C. 2000e-2(m).[7]

The primary purpose of Title VII is to eradicate discrimination, i.e., "to forbid employers to take gender [or any protected classification] into account in making employment decisions." *Price Waterhouse*, 490 U.S. at 239.[8] The Court has recognized that Title VII has secondary goals, as well. For example, encouraging the adoption of anti-discrimination policies, *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 764 (1998), and compensating victims of unlawful discrimination.[9] These other laudable objectives are

---

[7] We address the purpose and effect of 42 U.S.C. 2000e-2(m) in more detail *infra* at 15-17.

[8] *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (finding that awards of back pay serve the "primary objective... 'to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees'" because it provides employers an incentive "to shun practices of dubious legality.") (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971)); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 768 (1976), fn. 28 (finding that "seniority relief" serves both "the 'make whole' objective of the statute" as well as the "very heart of Title VII's primary objective of eradicating present and future discrimination.") (internal quotation marks omitted).

[9] Indeed, as the Court noted in *Albemarle Paper*, the prospect of having to pay monetary damages is an important incentive for employers:

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.

consistent with, but do not override Title VII's primary purpose of eliminating race as a consideration in employment decisions. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (stating that "the central statutory purposes of [Title VII are] eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination"). Contrary to Petitioner's arguments, anti-discrimination policies, even good ones, alone may not protect employees from unlawful discrimination.

When considered in light of Title VII's primary and secondary purposes, it is clear that Title VII should be enforced as it is written, so that employers may be held liable whenever race was a "motivating factor" in an employment decision, provided that applicable agency requirements are met.

II. TITLE VII PROVIDES FOR EMPLOYER LIABILITY FOR THE BIASED ACTIONS OF ITS SUPERVISORS

A. Well-established general agency principles apply to Title VII.

By defining "employer" to include an employer's "agent[s]," 42 U.S.C. § 2000e(b), Congress clearly intended that general principles of agency would apply in cases of unlawful discrimination by employers and their agents. The Court has consistently applied those principles in previous Title VII cases. *E.g., Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 754 (1998) ("We turn to principles of agency law, for the term 'employer' is defined under Title VII to include 'agents'.") The Court has previously recognized that agency principles impute to the employer the actions of a biased employee that culminate in an unlawful employment

---

422 U.S. at 417-418 (quoting *United States v. N.L. Indus., Inc.*, 479 F. 2d 354, 379 (8th Cir. 1973)).

practice. *E.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 791 (1998) ("The very definition of employer in Title VII, as including an 'agent'. . . expressed Congress's intent that courts look to traditional principles of the law of agency in devising standards of employer liability in those instances where liability for the actions of a supervisory employee was not otherwise obvious."); *Ellerth*, 524 U.S. at 754. As this Court has further noted:

> An employer can, in a general sense, reasonably anticipate the possibility of such conduct occurring in its workplace, and one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim.. . . developments like this occur from time to time in the law of agency.

Id. at 798.

B. Imputation of bias under Title VII is not properly limited to situations where the final decision-maker is biased.

Petitioner's argument that only officially exercised, delegated authority of final decision-makers can be imputed to employers, and that a supervisor's biased reports about an employee cannot (Pet. Br. at 4-5, 11-21), is contrary to the plain language of the statute, and is inconsistent with the Court's precedents. This Court has previously recognized the applicability of the "scope of authority" and "aided by agency" forms of agency in the Title VII context. *See Faragher*, 524 U.S. at 791; *Ellerth*, 524 U.S. at 760. Limiting the application of agency principles to individuals who are the formal, ultimate decision-makers, as Petitioner seeks to do (Pet. Br. at 23), would be inconsistent with both of those agency principles. Moreover, such a limitation would frustrate the primary purpose of the statute, i.e., to eliminate discrimination, and would deprive plaintiffs of relief against employers who empower biased supervisors to cause

adverse employment actions based on discriminatory motives.

Employment decisions often involve input and action by a wide range of supervisory and human resources employees. This is increasingly true today, when so many companies maintain offices in multiple locations and employ hundreds, or even thousands, of employees. Neither the plain language of Title VII, general agency principles nor this Court's reasoning in *Faragher*, *Ellerth*, or *Meritor* limit agency to the "actual decision maker" or to the person with "principal responsibility" or to the person officially delegated to act, as the Petitioner seeks to do.

C. A supervisor's actions may be imputed to an employer when they fall within the supervisor's "scope of employment" or actual authority

The Restatement (Second) of Agency ("the Second Restatement") is a useful starting point for the content and application of general agency principles.[10] The Second Restatement provides that agency principles impute to an employer an employee's conduct when the employee's conduct occurred within the scope of his or her employment or when an employee's act has been "aided by" the agency relationship. Second Restatement § 219(1) ("A master is

---

[10] *Ellerth* 524 U.S. at 755 ("[T]he Restatement (Second) of Agency (1957) (hereinafter Restatement), is a useful beginning point for a discussion of general agency principles."); *Faragher*, 524 U.S. at 792 ("[A]lthough we cautioned that "common-law principles may not be transferable in all their particulars to Title VII, we cited the Restatement §§ 219-237, with general approval.") (citing *Meritor*, 477 U.S. at 72). The Supreme Court has endorsed the approach in the Second Restatement but has not endorsed the Restatement (Third) of Agency cited by Petitioners. (Pet. Br. at 42.) Even under the Third Restatement, the actions of employees within "the scope of employment" are imputed to employers. *See* Restatement (Third) of Agency, §7.07 (2006).

subject to liability for the torts of his servants committed while acting in the scope of their employment."). The Second Restatement further states that, "[t]o be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." Second Restatement § 229 (1).

Where bias taints an employment practice through the actions of a supervisor—such as the management and evaluation of subordinate employees—long-established agency principles dictate that the bias may be imputed to the employer. This is true even when the ultimate result of the lower-level supervisor's discriminatory actions is something the employer never intended, or even something the employer attempted to prevent.[11] An employer may well wish to prevent a supervisor from making biased reports or recommendations about a subordinate employee, but when a supervisor nonetheless does so, the supervisor's wrongful act is within his or her scope of employment because the supervisor has behaved illegally while undertaking exactly the kind of task the employer has authorized the supervisor to undertake.[12]

---

[11] *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544 (holding that the Second Restatement provided that intentional torts may be within the scope of an agent's employment "even if the employee engages in acts 'specifically forbidden' by the employer and uses "forbidden means of accomplishing results") (citing Second Restatement § 230); *Shager v. Upjohn Co.*, 913 F.2d 398, 406 (7th Cir. 1990) (holding an employee liable "as an agent acting within the scope of his authority, even though [his] conduct was willful and unauthorized") (citing Second Restatement § 231; Prosser & Keeton, ON THE LAW OF TORTS 505 (5th ed. 1984)), *cited in Faragher*, 524 U.S. at 791.

[12] On the facts here, all the relevant actions may properly be imputed to BCI under an actual authority analysis. Those acts include: (i) Mr. Grado's allegedly biased report of Mr. Peters' conduct; (ii) Ms. Edgar's cursory evaluation of Mr. Peters' conduct;

D. The "aided by agency" agency analysis addressed by the Court in *Faragher* and *Ellerth* is unnecessary here.

Because this case involves a supervisor, Mr. Grado, performing exactly the type of task that he was authorized to perform, i.e., reporting the alleged misdeeds of a subordinate employee, Mr. Peters, it falls squarely within the "scope of authority" or "actual authority" agency analysis.[13] The Court does not need to consider the "aided by agency" agency analysis addressed by the Court in *Faragher* and *Ellerth*. Even under the Court's more limited "aided by the agency" analysis, however, Mr. Grado's actions could be imputed to BCI.

As explained in the Second Restatement section 219(2), an employee's actions may under certain circumstances be imputed to an employer, even if they fell outside the scope of his employment, if "the servant purported to act or to speak on behalf of the principal and

---

(iii) Ms. Edgar's light reading of Mr. Peters' personnel file; (iv) Ms. Edgar's communication with Mr. Grado (but not Mr. Peters); and (v) Ms. Edgar's decision to terminate Mr. Peters. Each of the kinds of action taken by Mr. Grado and Ms. Edgar were tasks of the kind BCI delegated to them, and thus fell with the scope of their actual authority. Ms. Edgar, as a member of the human resources team, was expected to receive reports about employee conduct and take action in response to those reports. Likewise, Mr. Grado, as a supervisor, was authorized to manage, evaluate, and report the activities of his subordinate employees. His actions may properly be imputed to BCI even if BCI never gave Mr. Grado authority to carry out his supervisory tasks in a racially discriminatory way. *See, e.g., Kolstad*, 527 U.S. at 544; *Ellerth*, 524 U.S. at 756.

[13] The Court need not consider an employer's liability, if any, for non-supervisory co-workers at this time. Because the supervisor in this case, Mr. Grado, was acting well within the scope of his actual authority when he reported Mr. Peter's alleged insubordination, the Court need not consider when, if ever, an employer may be held liable for a non-supervisor's bias.

there was reliance upon apparent authority, or he was *aided in accomplishing the tort by the existence of the agency relation.*" (Emphasis added.) The "aided in the agency relation" standard is always met when a supervisor takes an action that results in a tangible employment action against a subordinate.[14] *See, e.g., Faragher*, 524 U.S. at 789 ("There is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown."); *Ellerth*, 524 U.S. at 760 ("Every Federal Court of Appeals to have considered the question has found vicarious liability when a discriminatory act results in tangible employment action"). Although the "aided by" agency standard need not be addressed here, it is important to note that even in far more difficult cases such as *Faragher* and *Ellerth*, where the supervisor's discriminatory acts fell outside the scope of his authority,[15] the Court has

---

[14] When, for example, a supervisor terminates an employee, a "tangible employment action" occurs. *Ellerth*, 524 U.S. at 762 ("Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.") Adverse employment actions that fall short of termination, such as placing an employee on leave without pay or denying an employee a promotion, may also suffice to create liability under Title VII. *E.g., Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993) ("[I]f the plaintiff can show that she suffered an economic injury from her supervisor's actions, the employer becomes strictly liable without any further showing").

[15] *Faragher* and *Ellerth* involved the unique situation of a hostile work environment, where a supervisor uses his authority *to harass* an employee based on a protected characteristic. By contrast, this case involves the more straight-forward type of workplace discrimination fully anticipated and addressed by the 1964 Civil Rights Act, i.e., where a supervisor discriminates against employees in a protected class while and in the context of the supervisor performing his or her delegated duties.

found that employers could nonetheless be found liable for those acts under the "aided by" agency analysis.

III. "MOTIVATING FACTOR" IS THE APPROPRIATE CAUSATION STANDARD FOR DETERMINING WHETHER A SUPERVISOR'S DISCRIMINATORY ACTIONS CAUSED AN ADVERSE EMPLOYMENT ACTION.

Section 2000e-2(a) prohibits employers from discriminating against employees "because of" race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). This language requires a plaintiff alleging racial discrimination in the workplace to demonstrate a causal link between race and an unlawful employment practice.[16] In 1991, Congress amended Title VII to clarify the causation standard required by Title VII. The 1991 amendment makes it explicit that an employer also may be found liable when it or its agents use race as a factor in making an employment decision.

Section 42 U.S.C. § 2000e-2(m)(1994) provides (emphasis added):

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice.

Thus, under Title VII, if a plaintiff proves that the defendant acted "because of" discrimination by showing that unlawful

---

[16] *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (requiring a "causal connection" between the plaintiff's protected activities and the adverse employment action in a Title VII retaliation claim).

bias was "a motivating factor" in the employment practice at issue, the employer may be held liable.[17]

In *Desert Palace v. Costa*, 539 U.S. 90 (2003), the Court held that direct evidence is not required to entitle a plaintiff to a "mixed-motive" instruction. Prior to that holding, some courts had interpreted Title VII, based on *Price Waterhouse*, to require direct evidence of discrimination to prove a "mixed motive" claim, but only circumstantial evidence to prove a "single motive" claim. When this Court dispensed with the false evidentiary dichotomy, it took the first step towards recognizing that "single motive" and "mixed motive" cases do not require different standards of causation.[18] Regardless

---

[17] In interpreting a statute, a court must first consider whether the statutory language has a plain and unambiguous meaning. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If it does, the court must end its inquiry, so long as the statutory scheme is "coherent and consistent." *Id.* (internal quotation marks omitted). Whether language is plain or ambiguous is determined by reference to the language itself, the specific context in which the language is used, and the broader context for the statute as a whole. *Id.* at 341. Courts must presume that "Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). The fact that Congress added a separate, new statutory provision rather than amending the "because of" language in section 2000e-2(a) does not detract from this analysis. Section 2000e-2(a) applies only to unlawful employment practices committed by "employers." The prohibitions on unfair employment practices by employment agencies, labor organizations, and training programs are set forth in sections 2000e-2(b), (c) & (d) respectively. Clearly, Congress decided to save itself considerable trouble by amending section 2000e-2 once rather than four times.

[18] Following this Court's lead, several lower courts have moved towards dispensing with the false dichotomy between the causal standards traditionally applied to prove "mixed motive" and "single motive" claims. *See, e.g., Levias v. Texas Dep't of Criminal*

of the number of motives, reasons, or causes for an employment decision, whether race is a motivating factor is the key question under Title VII. *Costa*, 539 US at 98 ("Section 2000e-2(m) unambiguously states that a plaintiff need only 'demonstrat[e]' that an employer used a forbidden consideration with respect to "any employment practice.")

A. A "motivating factor" causes, contributes to, or influences the employment decision.

The legislative history underlying the 1991 Amendment illuminates the meaning of the causation standard implemented by the 1991 amendment:

> [T]he complaining party must demonstrate that discrimination actually contributed or was otherwise a factor in an employment decision or action. Thus, in providing liability for discrimination that is a "contributing factor," the Committee intends to restore the rule applied in many federal circuits prior to the Price Waterhouse decision that an employer may be held liable for any discrimination that is actually *shown to play a role* in a contested employment decision.

H.R. Rep. No. 102-40(I), at 48 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 586 (emphasis added).

The language of 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-2(m) clearly states that an employee need not demonstrate that race was the sole cause of the employment practice of which the employee complains. 42 U.S.C. § 2000e-2(a)(1) does not use the language *"solely because of."* In fact, Congress specifically rejected an amendment to Title VII that

---

Justice, 352 F.Supp. 2d 751, 764 (S. D. Tex. 2004); *Dare v. Wal-Mart Stores*, Inc., 267 F. Supp. 2d 987, 991 (D. Minn. 2003) (concluding that, in light of *Desert Palace*, "The dichotomy produced by the McDonnell Douglas framework is a false one.").

would have placed the word "solely" in front of the words "because of." *See* 110 CONG. REC 2728, 13837 (1964).

In *Price Waterhouse*, a plurality opinion, Justices Brennan, O'Connor, and White all agreed that "because of" in §2000e-2(a) did not mean "sole" causation. They differed, however, on how "because of" should be interpreted. Justice Brennan argued that "because of" did not mean "but for" causation, stating that courts should look to see if a protected characteristic was a "motivating factor" in the employment decision. Justice Brennan defined "motivating factor" as those situations where a protected characteristic "played a part in the employment decision[.]" 490 U.S. 228, 246 (1989) (opinion of Brennan, J.). Justice O'Connor, on the other hand, argued that "because of" *did* signify something close to "but for" causation. *Id.* at 262. (opinion of O'Connor, J.). Her Honor concluded that courts should look to see if "a forbidden factor played a *substantial role* in the employment decision," rather than whether it played any role at all. *Id.* at 269 (emphasis added). Justice White agreed with Justice O'Connor that "substantial factor" was the appropriate causation standard. *Id.* at 259 (opinion of White, J.). Justice Kennedy, in a dissenting opinion joined by two other Justices, argued that the "because of" language of Title VII mandated a "but-for" causation approach. *Id.* at 282.

Two years after the Court rendered this highly fractured plurality decision, Congress clearly and precisely endorsed Justice Brennan's interpretation of "because of" in the 1991 Civil Rights Act. Responding directly to *Price Waterhouse*, Congress wrote into the statute the "motivating factor" language used by Justice Brennan. In choosing that language, Congress explicitly rejected the "but for" or "substantial" causation approach Justice O'Connor and Justice White had espoused, and endorsed Justice Brennan's "played a part" standard instead. Any attempt to prove that causation requires something more than "motivating factor" is simply a futile attempt to reargue *Price Waterhouse*.

Congress has long since resolved the debate in favor of "motivating factor" when it enacted §2000e-2(m). The 1991 amendment precludes forcing a plaintiff to rely on the "but for" causation standard to determine whether an unlawful employment practice occurred "because of" race. See 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m).

The 1991 amendment also gives employers an important safeguard to protect against substantial liability in certain cases. Specifically, the amendment permits an employer to demonstrate that it would have taken the same action in the absence of the impermissible motivating factor. If the employer is successful in its showing, then the employer's liability is limited to specific equitable relief and attorneys' fees and costs rather than an award of monetary damages. In other words, under the amendment, employers can seek to limit liability (by demonstrating a lack of "but for" causation) even where they cannot escape it. See 42 U.S.C. § 2000(e)-5(g)(2)(B); Costa, 539 US at 94-95. The 1991 amendment provides:

> On a claim in which an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e–2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment[.]

42 U.S.C. 2000e–5(g)(2)(B). As the text of the amendment makes clear, "but for" causation has been relegated to a question of damages.

The correct interpretation of sections 2000e-2(a)(1) and 2000e-2(m) means that an employment practice is

unlawful if: (i) race is a motivating factor of an adverse employment practice; and (ii) the facts show that an employer did not somehow break the causal link between race and the adverse employment practice.

B. In addition to the explicit language of Title VII, ample case law justifies holding employers liable where a supervisor's racial animus was a "motivating factor" in an unlawful employment practice.

1. Employer liability for supervisor bias has been endorsed by all the Circuit Courts of Appeals to have considered the issue.

Every circuit to address the issue of an employer's liability for the bias of a subordinate has recognized some version of the "cat's paw," "rubber stamp," or subordinate supervisor liability doctrine. *Santiago-Ramos v. Centennial*, 217 F.3d 46, 55 (1st Cir. 2000); *Abramson v. William Paterson Coll. of New Jersey*, 260 F.3d 265, 286 (3d Cir. 2001); *Hill v. Lockheed Martin*, 354 F.3d 277, 288 (4th Cir. 2004); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998); *Willis v. Marion Cty. Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir. 1994); *Bergene v. Salt River*, 272 F.3d 1136, 1141 (9th Cir. 2001); *English v. Colo. Dept. of Corrections*, 248 F.3d 1002, 1011 (10th Cir. 2001); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999); *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998).

Although the circuits have employed myriad terms to define precisely when and how the theory is to be applied, all of the Circuit Courts of Appeals to have considered the

issue[19] have held that liability under the doctrine ultimately hinges on some formulation of a causation analysis.[20] Apart from the Fourth Circuit's decision in *Hill*, 354 F. 3d at 286, discussed *infra* at p. 22, the general consensus of the Circuit Courts of Appeals is that causation is the critical element of the analysis, and this emphasis is squarely rooted in the statutory language of 42 U.S.C. 2000e-2(a)(1) (forbidding employer to discharge an employee "*because of* such individual's race.") (emphasis added).

2. An "influence" can be a cause and a motivating factor.

Simply stated, the basic inquiry in a subordinate supervisor liability case is "whether the biased supervisor's discriminatory reports, recommendation, or other actions caused the adverse employment action." *EEOC v. BCI Coca Cola*, 450 F.3d 476, 487 (10th Cir. 2006). Consensus on causation has not compelled judicial consistency with the

---

[19] The decision of the Ninth Circuit in *Bergene* represents an exception to this rule, concluding that an employer is liable under Title VII based on the mere "involvement" of a biased subordinate in an employment decision. *Bergene*, 272 F.3d at 1141. Other Ninth Circuit cases have accepted that causation is required when construing Title VII in the retaliation context. *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1065-1066 (9th Cir. 2003) (stating that, to make out a prima facie case of retaliation under Title VII, the plaintiff must demonstrate that "(1) she engaged in a protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between her activity and the employment decision.") (citing *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003)).

[20] As discussed *infra* at p. 21, *amici* disagree with the Tenth Circuit's assessment of the Fifth Circuit and other courts use of the influence standard as negating the element of causation. By definition, influence necessarily implies a causal connection. THE WEBSTER'S NEW WORLD COLLEGE DICTIONARY, 733 (4th ed. 2004), for example, defines "influence" as "the power of persons or things to affect others, seen only in its effects."

terminology used to define the appropriate causation standard. Regardless of linguistic inconsistencies, in practice the majority of courts rely on the same underlying principles in their inquiry by determining whether the plaintiff's protected class was a "motivating factor" in the final employment decision.[21] The Seventh Circuit, for example, has held that a showing by the plaintiff that a supervisor's recommendation, motivated by discriminatory conduct, was "a cause of [the plaintiff's] injury" is sufficient to impose liability on the employer, "whether or not [the formal decision maker] could reasonably be thought a mere cat's

---

[21] *Santiago-Ramos v. Centennial*, 217 F.3d 46, 55 (1st Cir. 2000) ("[The plaintiff] can establish Centennial's stated reasons for her dismissal are a pretext for discrimination in a number of ways. One method is to show that discriminatory comments were made by the key decisionmaker or those in a position to influence the decisionmaker."); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) ("[I]t is appropriate to tag the employer with an employee's age-based animus if the evidence indicates that the worker possessed leverage, or exerted influence, over the titular decision maker."); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 355 (6th Cir. 1998) ("We must therefore determine whether a reasonable jury could conclude that Gallagher was in a position to influence the alleged decision to deny [the plaintiff] the possibility of transferring to available positions within the company."); *Christian v. Wal-Mart*, 252 F.3d 862, 877 (6th Cir. 2001) ("[T]o complete a prima facie case under such circumstances, the plaintiff must offer evidence that the supervisor's racial animus was the cause of the termination or somehow influenced the ultimate decisionmaker."); *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998) ("Thus do we join at least four other circuits in holding that evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence."). *But see Hill v. Lockheed Martin*, 354 F.3d 277, 287 (4th Cir. 2004) ("The discrimination statutes . . . do not make employers vicariously liable for the discriminatory acts and motivations of everyone in their employ, even when such acts or motivations lead to or influence a tangible employment action.")

paw." *Lust v. Sealy*, 383 F.3d 580, 584 (7th Cir. 2004). The Third Circuit framed the test slightly differently while tackling the same fundamental idea, holding that "it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate." *Abramson v. William Paterson Coll. of New Jersey*, 260 F.3d 265, 286 (3d Cir. 2001).

The requirement that a plaintiff must prove that discriminatory conduct influenced an employment practice, which is commonly accepted in these cases, requires a causal link short of the "but for" causation standard rejected by Congress in the 1991 amendments. *See* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 Geo. L.J. 489, 506 (2006). The requirement that the discriminatory conduct must "influence" the decision encapsulates the motivating factor standard set forth in the 1991 Amendment to Title VII. Katz, 94 Geo. L.J. at 505-506 ("Congress said that [the motivating factor] test would be satisfied when a protected characteristic, such as race or sex, was a factor influencing the decision."). (internal quotation marks omitted)

3. The Tenth Circuit's decision below is ultimately consistent with the "influence" or "motivating factor" analysis utilized by other Circuit Courts of Appeals

The Tenth Circuit's decision is consistent with the "motivating factor" standard of causation. The court held that the employer's investigation was inadequate as a matter of law because it failed "to defeat the inference that Mr. Grado's racial bias *tainted* the decision." *BCI*, 450 F.3d at 492 (emphasis added). This language falls in line with the multitude of other courts to hold that if a plaintiff shows that discriminatory animus influenced the decision, the plaintiff will survive summary judgment.

Earlier in its opinion, however, the Tenth Circuit expressed disapproval of its sister circuits, which have held that summary judgment is improper if the biased subordinate "exerted influence" on the adverse employment action, opining that such an analysis "improperly eliminates a requirement of causation." *Id.* at 487. To the contrary, the concept of "influence" necessarily encompasses only those actions that produce an effect on the actions of others. The Tenth Circuit's misinterpretation of the decisions of its sister circuits led the court improperly to dismiss a standard that, when applied, comports with the unequivocal statutory language and Congressional intent behind Title VII.

Despite its mischaracterization of other circuits' decisions, the Tenth Circuit's ultimate holding is consistent in principle with the "motivating factor" standard of causation and its formulation in the other Circuit Courts of Appeals. *See BCI*, 450 F.3d 476. Thus, while Judge McConnell rejected the language of "influence," he did not reject its meaning. *Amici* agree with the Tenth Circuit that causation is required by the "motivating factor" standard. Where racism "influences" an outcome, however, race *is* causative.

4. The Fourth Circuit, an outlier in these cases, fundamentally misapplied the causation principles under Title VII and ignored the clear language of the statute.

The Fourth Circuit in *Hill v. Lockheed Martin* purported to apply the correct causation standard, stating that the employee "need not demonstrate that the prohibited characteristic was the sole motivating factor to prevail, so long as it was a motivating factor." 354 F.3d at 284. In application, however, the Fourth Circuit strayed radically from its sister circuits and the explicit language of Title VII. In requiring that the supervisory employee must be the "actual decision maker" to create liability for the employer,

the Fourth Circuit ignored the statutory directive and misconstrued the Supreme Court holdings in *Ellerth* and *Faragher*. The Fourth Circuit asserted that causation could be proven for purposes of Title VII only when the discriminatory motivations of the "actual decision maker" caused an adverse employment action. *Hill*, 354 F.3d at 291. In so doing, the Fourth Circuit failed to acknowledge the Supreme Court's recognition of employer liability when an agent misuses its authority to alter the terms and conditions of a subordinate's employment, even when no tangible employment action is taken.[22] *See Ellerth*, 524 U.S. at 765.

IV. IN PRACTICE, APPLICATION OF THE "MOTIVATING FACTOR" STANDARD OF CAUSATION WILL NOT INCREASE EMPLOYER LIABILITY FOR UNLAWFUL DISCRIMINATION

Consistent application of the "motivating factor" causation standard would significantly clarify the substantive rights of employers and employees in employment discrimination cases. As a practical matter, however, it would not alter the procedural landscape.

To prevail under a motivating factor analysis, the employee must demonstrate the following: (i) supervisor bias; (ii) an agency relationship to impute liability to the employer; and (iii) that the supervisor's action was a motivating factor for the ultimate employment decision. A jury must then ultimately conclude that race was a motivating factor.[23] Assuming the jury concludes that race was a motivating factor, in appropriate cases the employer

---

[22] Of course, in *Ellerth*, the Supreme Court also mandated absolute employer liability when supervisor harassment "culminates in a tangible employment action." 524 U.S. at 765.

[23] At any time during the litigation, the trial court can, of course, apply the appropriate summary judgment analysis and determine whether there are contested issues of material fact warranting a decision by the fact finder and, if not, dismiss the claim.

may still be able to limit its exposure if it can prove that it would have taken the same action despite the consideration of race, i.e., if the employer can prove that the causal chain between the racist conduct and the employment decision has been broken. In such a case, Title VII would limit the plaintiff's remedies. 42 U.S.C. § 2000e-5(g)(2)(B). Where an individual proves a violation under section 2000e-2(m), the employer has a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff if the employer is able to "demonstrate that [it] would have taken the same action in the absence of the impermissible motivating factor." *Id.*

Finally, assuming the employee clears all these hurdles, the employee's ability to obtain any type of punitive damages award is limited and takes into account all the employers policies and actions to prevent discrimination in the work place.[24] Title VII and the Court have properly balanced the employee's rights and employer's responsibilities through these proof requirements.

In practice, when the "motivating factor" standard is applied, an employer's non-discriminatory justification for taking action may, in an appropriate case, still entitle the defendant to summary judgment. For example, if an employer claims to have fired a plaintiff because he or she was caught stealing money from the company and the plaintiff admits to committing the impropriety (or the employer confirms the incident with a neutral third party),

---

[24] In *Kolstad*, the Court found that although the petitioner may have established liability under Title VII, punitive damages could be limited. *Id.* at 544. ("Where an employer has undertaken such good faith efforts at Title VII compliance, it 'demonstrat[es] that it never acted in reckless disregard of federally protected rights."); *see also Harris v. L & L Wings*, 132 F.3d 978, 983 (4th Cir. 1997) ("In some cases, the existence of a written policy instituted in good faith has operated as a total bar to employer *liability for punitive damages.*") (emphasis added).

the plaintiff's claim may properly be subject to a motion for summary judgment.[25] In those cases in which disputed facts remain, however, the plaintiff still has the opportunity to show at trial that the employment decision was made, at least in part, because of his or her race. The plaintiff may satisfy this burden by "showing that the employer's proffered explanation is unworthy of credence," *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981), or by demonstrating that race was "a motivating factor" in the employment decision, 42 U.S.C. § 2000e-2(m).

V. IN EMPLOYMENT DISCRIMINATION CASES, EMPLOYER LIABILITY IS NECESSARILY BASED ON FACTUAL DETERMINATIONS, THUS A BRIGHT-LINE RULE CANNOT EFFECTUATE THE GOALS OF TITLE VII IN ALL WORKPLACES

Title VII commands actual non-discrimination, not the mere creation of anti-discrimination policies. BCI nonetheless argues for a bright-line rule that would allow the mere existence of these policies and any investigation into biased animus to insulate an employer from liability under Title VII. Such a holding would undermine the purposes of Title VII. Employers would simply need to demonstrate the existence of a policy and that the policy was followed to escape liability for even the most egregious of discriminatory acts. Not surprisingly, courts have flatly

---

[25] A plaintiff may still be able to overcome such a showing by the employer if the plaintiff can demonstrate that the racist supervisor ignored similar violations by employees who were not in a protected class, or that the supervisor was motivated by racism when he or she reported the plaintiff's violation. *McDonald v. Santa Fe*, 427 U.S. 273 (1976). The possibility of liability in this scenario will encourage employers to institute policies or conduct investigations to ensure that employees in positions of authority do not punish or ignore violations by subordinates based on race.

rejected this formalistic and flawed interpretation of Title VII's requirements. As the Court stated in *Meritor*,

> [W]e reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive.

477 U.S. 57, 72 (1986); *see also, e.g., Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 n.13 (5th Cir. 2000) ("If this were not so and we adhered to a rigid formalistic application, employers could easily insulate themselves from liability by ensuring that the one who performed the employment action was isolated from the employee, thus eviscerating the spirit of the 'actual decisionmaker' guideline.").[26]

Although an independent investigation of potential supervisor bias may be sufficient to break the causal chain in one case, it may be woefully insufficient in another, depending on the facts and circumstances of each case. As the unanimous Court so aptly explained just last year "[c]ontext matters. 'The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships . . . .'" *Burlington Northern v. White*, 126 S. Ct. 2405, 2415 (2006) (citing *Oncale v. Sundown Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998)). The existence of anti-discrimination policies, and what investigation an employer may, or may not have

---

[26] *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998) (holding that the "[decisionmaker] rule was never intended to apply formalistically, and [thus] remarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless played a meaningful role in the decision to terminate the plaintiff, [are] relevant.").

performed all may have relevance. Ultimately, the "context" in which these actions take place "matters" and requires a case-specific analysis that judges and juries can effectively perform.

The employment relationship is unique to each employer and its employees. And the facts surrounding "routine" employment decisions vary from workplace to workplace and from employee to employee. Although courts are not "super-personnel departments," they are charged with reviewing employment decisions that involve discrimination. *See Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1052 (8th Cir. 2006) (citing *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995)).[27] There is no one policy or type of investigation that, based on its mere existence, should insulate the employer from liability as Petitioner seems to suggest. Employment discrimination cases involve significant factual determinations, including factual determinations regarding the adequacy of any anti-discrimination policies both as written and as carried out in practice.

---

[27] Furthermore, there is no guarantee that a workplace policy would be effective in preventing and rooting out discrimination. Some researchers suggest that many of these policies are no more than symbolic statements against discrimination, with no practical or deterrent effect. *See* John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 AM. SOC. REV. 794, 800 (1996); Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, Law & Soc'y Rev., Volume 27, Number 3, at 497 (1993).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below, but make clear what Congress has made clear in Title VII: an employer can be held liable for the bias of a supervisor if the bias was a motivating factor for an adverse employment practice.

Respectfully submitted,

Michael Foreman
(*Counsel of Record*)
John C. Brittain
Daria E. Neal
Zoe Segal-Reichlin
Sarah Crawford
Adam Stofsky

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Ave. NW
Suite 400
Washington, DC 20005
(202) 662-8600

Michael B. de Leeuw
Darcy M. Goddard
Georgina Costello
(*admission pending*)
Vivek Reddy
Sarah Hinchliff

FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
One New York Plaza
New York, New York 10004
(212) 859-8000

Attorneys for Amici Curiae

APPENDIX

APPENDIX

List of *Amici*:

Organizations

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee, through its Employment Discrimination Project, has been continually involved in cases before the Court involving the proper scope and coverage afforded to federal civil rights laws prohibiting employment discrimination.

AARP is a nonprofit nonpartisan membership organization of more than 38 million people age 50 or older dedicated to addressing the needs and interests of older Americans. More than fifty percent of AARP's members remain active in the work force. For this and many other reasons, e.g., a majority of AARP members are female, growing numbers are members of racial or ethnic minorities, and a disproportional share of age 50+ workers have or will develop disabilities, AARP members rely on the protections of Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act and other federal laws prohibiting employment discrimination that will be affected by the Court's decision in this case. AARP has long

advocated broad interpretation and vigorous enforcement of these statutes, which are of paramount importance to all employed people, including millions of older workers, who look to them to deter, prevent, and remedy invidious discrimination in the work place.

The American Association of People with Disabilities ("AAPD") is a national membership organization that brings together people with disabilities, their family members and supporters to be a powerful force for change–politically, socially and economically. AAPD was founded on the fifth anniversary of the signing of the Americans with Disabilities Act and has a strong interest in full enforcement and implementation of all provisions of that law, including the employment non-discrimination proscriptions. The resolution of the legal standard at issue in this case will have a direct impact on the interpretation of the employment provisions in the ADA, which are modeled after Title VII of the Civil Rights Act of 1964.

The Asian American Justice Center ("AAJC") is a national non-profit organization whose mission is to advance the legal and civil rights of Asian Americans. AAJC and its affiliates have a long-standing interest in employment discrimination issues that have an impact on the Asian American community, and this interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of

minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of age, racial, religious, and ethnic bias.

The National Partnership for Women & Families is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and people of color in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace, including through the full enforcement of Title VII of the Civil Rights Act of 1964, as amended. NWLC has prepared or participated in numerous *amicus* briefs involving sex discrimination in employment before this Court.

Pick Up the Pace is a San Francisco-based non-profit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace, emphasizing the role of law in combating glass ceiling discrimination, gender stereotyping and work/family conflict. Established in 2005, the organization seeks to raise awareness of cutting edge gender bias issues in the

workplace through public education and legal advocacy, most recently as *amicus curiae* before this Court in *Burlington Northern & Santa Fe Railway Co. v. Sheila White* and *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*

The Public Justice Center ("PJC") is a non-profit civil rights and poverty law organization dedicated to advancing the interests of and enforcing the rights of the under-represented. Established in 1985, the PJC has used impact litigation, public education, and legislative advocacy to accomplish law reform for its clients in the areas of workers' rights, civil rights, disability rights, housing, and children's rights. The PJC has also established an Appellate Advocacy Project to expand and improve the representation of indigent and disadvantaged persons and the presentation of civil rights issues before Maryland and federal appellate courts. The PJC represents low-wage, at-will employees in numerous cases involving wage and hour violations and race and gender discrimination and has a longstanding commitment to protecting civil rights in the area of employment. Its Appellate Advocacy Project has submitted or joined in a number of briefs of *amicus curiae* in recent cases involving the protection of workers' ability to seek relief for employment discrimination.

10

No 06-341

FILED

MAR 2 7 2007

OFFICE OF THE CLERK

In The Supreme Court of the United States

BCI COCA COLA BOTTLING COMPANY OF LOS ANGELES,

Petitioner

v

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC , AND MARIANNE SAWICKI, IN SUPPORT OF RESPONDENT

ERIC SCHNAPPER
Counsel of Record
School of Law
University of Washington
PO Box 353020
Seattle, WA 98195
(206) 616 3167

MARISSA TIRONA
Program Director
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
44 Montgomery Street, Suite 2080
San Francisco CA 94104
(415) 296 7629

THEODORE SHAW
Director-Counsel
JACQUELINE A BERRIEN
NORMAN J CHACHKIN
ROBERT H STROUP
MELISSA S WOODS
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC
99 Hudson Street Suite 1600
New York NY 10013 2897
(212) 965-2200

Counsel for Amici

COCKLE LAW BRIEF PRINTING CO (800) 225 6964
OR CALL COLLECT (402) 342 2831

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	2
I. UNDER AGENCY PRINCIPLES EMPLOYERS ARE LIABLE FOR THE CONDUCT OF EMPLOYEES IN THE EXERCISE OF THEIR AUTHORITY	4
II. EMPLOYER LIABILITY IS NOT LIMITED TO THE ACTIONS OF THE LAST AGENT INVOLVED IN A CHAIN OF DECISION-MAKING	13
III. AN EMPLOYER IS LEGALLY RESPONSIBLE FOR INJURIES CAUSED BY THE DISCRIMINATORY CONDUCT OF ITS AGENTS	23
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES:

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 5

Burlington Industries v. Ellerth, 524 U.S. 742 (1998) ..... *passim*

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 6

Delaware State College v. Ricks, 449 U.S. 250 (1980) 8, 24

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 4, 6, 7, 15, 19

Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277 (4th Cir. 2004), *cert. dismissed*, 543 U.S. 1132 (2005) 2, 22

Karibian v. Columbia University, 14 F.3d 773 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994) 4

Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) 19, 21

Martin v. Mecklenburg County, 151 Fed. Appx. 275 (4th Cir. 2005) 14

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) 2, 4, 5, 19

Meyer v. Holley, 537 U.S. 250 (2003) 4

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 8

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 131 (2000) 3, 7, 19, 25, 28

Sawicki v. Morgan State University, et al., No. 06-603 ..... 1, 23

TABLE OF AUTHORITIES – Continued

Page

Shager v. Upjohn Co., 913 F.3d 398 (7th Cir. 1990) 4, 8

United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) 24

STATUTES:

42 U.S.C. § 706(g)(2)(B) 25

RULES:

Supreme Court Rule 37.3 1

OTHER AUTHORITIES:

2 F. Harper, F. James & O. Gray, The Law of Torts 24 (2d ed. 1956) 5

5 F. Harper, F. James & O. Gray, The Law of Torts, § 26.3, p. 15 (2d ed. 1986) 12

Restatement (Second) of Agency, § 219(2)(a) 9

Restatement (Second) of Agency, § 219(2)(d) 5

Restatement (Third) of Agency, §7.07 ..... 5, 6

Restatement (Third) of Agency § 7.08 6

W. Seavey, Handbook of the Law of Agency, 141 (1984) 12

INTEREST OF *AMICI*[1]

The National Employment Lawyers Association ("NELA") is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York, formed to redress injustice caused by racial discrimination and to assist African-Americans in securing their constitutional and statutory rights. For over six decades, LDF attorneys have represented parties in litigation before this Court and other federal courts on matters of race discrimination in general, and employment discrimination in particular.

Marianne Sawicki is the petitioner in *Sawicki v. Morgan State University, et al.*, No. 06-603, now pending before this Court. The question presented in *Sawicki* is essentially the same as the question presented in the

---

[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

instant case. Ms. Sawicki's Title VII claim was dismissed by the lower courts applying the ultimate decisionmaker standard adopted for the Fourth Circuit in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc), *cert. dismissed*, 543 U.S. 1132 (2005). Petitioner in the instant case is urging this Court to adopt the rule in *Hill*.

SUMMARY OF ARGUMENT

The employer in this case, as commonly occurs, took certain personnel actions as the result of a "chain of decisionmaking" (Pet. Br. 44). In that decisionmaking process several BCI officials played distinct roles and were allocated responsibility for making different types of decisions.

Whether an employee who plays a role in a decisionmaking process acts as an agent of the employer is governed by traditional agency law principles. The conduct of an official is properly imputed to his or her employer when the official "exercises the authority actually delegated to him by his employer." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 70 (1986). Grado was doing precisely that when he carried out the established responsibility of a BCI supervisor to select which potential disciplinary matters to raise with the human resources department, and when he "presented the facts" to that department.

Employer liability is not limited to the conduct of the last decisionmaker in a chain of decisionmaking, the so-called "ultimate decisionmaker." In the case of a termination, that last decisionmaker – in this case the one who selected termination as the sanction – is not the only, or necessarily the most important, decisionmaking agent. "Agency principles [impose] vicarious liability for harm caused by misuse of supervisory authority." *Burlington*

Industries v. Ellerth, 524 U.S. 742, 764 (1998). That principle is equally applicable regardless of when in the decisionmaking process the misuse of authority occurs. The far different "ultimate decisionmaker" standard proposed by petitioner, and adopted by the Fourth Circuit, has – as a district judge in that circuit recently observed – "the unfortunate potential to create a safe harbor for workplace discrimination."

A plaintiff must demonstrate that an improperly motivated official, acting as an agent of his or her employer, took some act that caused the dismissal or other injury complained of. That improperly motivated act must be a but-for cause; it must have had "a determinative influence on the outcome" of the decisionmaking process. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 131, 141 (2000).

Neither a showing that the ultimate decisionmaker made an "independent judgment" about the facts presented by other officials, nor evidence that that decisionmaker undertook an "independent investigation" of the facts, will necessarily preclude in every case a finding that the invidiously motivated act caused the injury complained of. The exculpatory evidence proffered by an employer to show that a disputed adverse action was not caused by an earlier discriminatory act must specifically address the particular type of discriminatory act taken, and the manner in which that act assertedly brought about the adverse action.

I. UNDER AGENCY PRINCIPLES EMPLOYERS ARE LIABLE FOR THE CONDUCT OF EMPLOYEES IN THE EXERCISE OF THEIR AUTHORITY

This is a case about agency law. "[T]he courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 77 (1986). "[T]here is nothing remarkable in the fact that claims against employers for discriminatory actions . . . like . . . firing . . . have resulted in employer liability once the discrimination is shown." *Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998).

Employer liability for a discriminatory discharge is an unremarkable application of the established agency principle that an employer is liable when its employee uses, or abuses, his or her authority. "[T]he supervisor acts within the scope of this authority when he makes discriminatory decisions in . . . firing. . . ." *Faragher*, 524 U.S. at 791. "[A] supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so beyond the orbit of his responsibilities as to excuse the employer." *Shager v. Upjohn Co.*, 913 F.3d 398, 405 (7th Cir. 1990).

That principle is not limited to dismissals or any other particular type of official act. Regardless of the type of authority wielded by an official, "[i]t is well established that traditional vicarious liability rules make principals or employers vicariously liable for the acts of their agents or employee in the scope of their authority." *Meyer v. Holley*, 537 U.S. 250, 285 (2003); see *Karibian v. Columbia University*, 14 F.3d 773, 777 (2d Cir.) (employer liable where

supervisor "wields the employer's authority"), *cert. denied*, 512 U.S. 1213 (1994); 2 F. Harper, F. James & O. Gray, The Law of Torts 24 (2d ed. 1956) (employer liable when "the servant is engaged in performing what he is hired to do"). "[W]here a supervisor exercises the authority actually delegated to him by his employer, by making decisions . . . affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to make them." *Meritor*, 477 U.S. at 70. "[T]he employer is vicariously liable for . . . company acts that can be performed only by the exercise of specific authority granted by the employer." *Burlington Industries v. Ellerth*, 524 U.S. 742, 768 (1998) (Thomas, J., dissenting). Such authority or power, "once granted, does not disappear like a magic gift when it is wrongfully used." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971).

The Restatement of Agency, in its various iterations, has embraced this rule. The Second Restatement of Agency states that an employer is liable for the torts of an agent where the agent "was aided in accomplishing the tort by the existence of the agency relation." (Restatement (Second) of Agency, § 219(2)(d).) The Third Restatement provides that an employer is liable for torts committed by employees "within the scope of employment," and defines scope of employment to mean "performing work assigned by the employer." (Restatement (Third) of Agency, §7.07).[2]

---

[2] The action of an employee would be part of "an independent course of conduct," and thus outside his or her assigned duties, only if that conduct "represents a departure from, not an escalation of, conduct involved in performing assigned work." Section 7.07, comment b.

(Continued on following page)

Whatever differences may exist between these two articulations, they both embrace the rule long applied by this Court that an employer is liable for the conduct of its agent in exercising his or her official authority. That rule encompasses both authority in the sense of the power to direct the actions of others (e.g., to tell the personnel department whether to stop paying a worker) and authority in the sense of delegation of the responsibility to act in

---

Petitioner makes much of the fact that the drafters of the Third Restatement, writing forty-two years after the adoption of Title VII, chose to omit the "aided in" language that was contained in the Second Restatement and that was relied on by this Court in *Ellerth* and *Faragher*. (Pet. Br. 42). This change, however, is expressly limited to the standard of vicarious liability "for a tort committed by an agent in dealing or communicating with a third party." Restatement (Third) of Agency § 7.08. The comment to section 7.07 explains that the Restatement's analysis of tort liability to third parties "is inapplicable to an employer's liability for one employee's tortious conduct toward a fellow employee, a topic being considered by the Restatement . . . Employment Law, in preparation as the Restatement, Third, Agency was completed."

To the extent that the drafters of the Third Restatement decided to omit the "aided in" standard in the Second Restatement, that is of no significance to the meaning of Title VII. The Second Restatement described prevailing law when it was adopted in 1958, and remained unquestioned for four decades after the enactment of Title VII. In directing that agency principles be applied to determine the scope of employer liability under Title VII, Congress did not intend to give to the members of the American Law Institute authority to promulgate, and change at will, legal standards accorded the great weight of federal regulations under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The drafters candidly acknowledged that for years the "aided in" standard in section 219(2)(d) of the Second Restatement was "widely" construed in a literal manner. Restatement (Third) of Agency, § 7.08, Rptrs. Note b. The fact that the drafters (or, at least, the reporter) of the Third Restatement in 2006 feared that this widespread view of agency law would unduly expose employers to vicarious liability does not retroactively change the prevailing agency law on which Congress relied in enacting the 1964 Civil Rights Act.

the name of the employer (e.g., to decide whether to reimburse an employee for a claimed business expense).

Where a company official, acting with an unlawful purpose, uses his or her authority to dismiss an employee or take some other official action, the courts have held the employer liable without regard to *why* the official chose to discriminate on the basis of race, gender, national origin, age, disability, or other prohibited characteristic. Specifically, a plaintiff who has been the victim of a discriminatory official action is not required to prove that the official involved believed that that discrimination was somehow in the interests of the employer. Doubtless it is frequently the case that a biased official believes that employees of a particular race, gender, or age are inferior workers, but proof of such a belief is *not* necessary to establish employer liability for the exercise of official authority. Under *Faragher* and *Ellerth*, for example, an employer is strictly liable if a supervisor dismisses a subordinate because she spurned his sexual advances, even though the supervisor in doing so would be acting for "personal motives, motives unrelated and even antithetical to the objectives of the employer." *Ellerth*, 524 U.S. at 776.

The application of this principle is easy in a case in which a disputed employment action, such as a dismissal, was solely the result of a single decision. But, except for very small employers, employment actions are more often the result of a number of discrete decisions that may involve two or more different officials, each authorized to play a distinct role. This Court has repeatedly recognized that employers, rather than leaving decisions (particularly important decisions such as promotions and dismissals) to the exercise of ad hoc discretion, frequently utilize instead some sort of structured "decisionmaking process." *Reeves v.*

Sanderson Plumbing Products, Inc., 530 U.S. 133, 137, 141 (2000) (plaintiff dismissed by company president based on recommendations of and information from three supervisors); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236, 248 (1989) (partnership denied by Policy Board after comments by numerous partners and recommendation by Admissions Committee); see *Delaware State College v. Ricks*, 449 U.S. 250, 252 (1980) (tenure denied by Board of Trustees based on recommendation of tenure committee and Faculty Senate). Petitioner aptly characterizes such processes as involving a "chain of decisionmaking." (Pet. Br. 44).

Litigation in this Court and the lower courts illustrates the range of distinct decisions that, taken in concert, may lead to the dismissal of an employee:

(1) the adoption of rules regarding employee conduct, disciplinary procedures, and/or sanctions to be imposed,

(2) the initiation of the disciplinary process,

(3) assembling the body of information on the basis of which action will be taken,

(4) factual determinations,

(5) determinations as to whether the facts so found violate the employer's rules,

(6) recommendations regarding factual determinations, applicability of employer rules, or the appropriate sanction to be imposed, and

(7) the selection of the sanction to be imposed.

Any of these decisions can be among "the kind[s] of thing[s] that [an official] is authorized to do," *Shager*, 913 F.2d at 405, and a decisionmaking process simply could not function unless at least most of these responsibilities were given to some official or officials. Employers are free

to divide responsibility for these different decisions between or among any number of officials and employees.[3]

Each of these actions involves a distinct decision; thus a single employment action (e.g., a dismissal) may involve several different decisionmakers each dealing with different aspects of the process. Petitioner stresses that Edgar was "the decisionmaker"; that is correct in the sense that it was Edgar who made the decision to select dismissal (rather than, for example, suspension or demotion) as the sanction to be imposed. But Grado, too, made several key decisions; for example, it was Grado, and he alone, who decided to bring this entire matter to the attention of the Phoenix office – the only office, according to BCI, which could select dismissal as a decision.

In determining whether an employer is legally responsible for a particular decision in a chain of decisionmaking, the usual agency standards apply. For example, if a personnel recommendation were made by a company's president, the employer would be legally responsible, since such a high-ranking official is deemed an alter ego of the employer. *Ellerth*, 524 U.S. at 758 (citing Restatement (Second) of Agency, § 219(2)(a)). If making personnel recommendations was among the duties of a supervisor, human resources official or other employee, that employee's exercise of that authority would be an act of the employer. Conversely, if an employee who made an unsolicited recommendation (that, for example, a co-worker be fired) had no responsibility for making

---

[3] Brief *Amicus Curiae* of the Equal Employment Advisory Council, 14 ("Large employers often delegate initial investigations of workplace misconduct to local human resources personnel, who in turn report their findings to a more senior manager who may work in a different city or state.").

personnel recommendations, and did not act for the purpose (however misguided) of advancing the employer's interest, the employer would not be responsible for that recommendation or for a possibly invidious motive behind it. Similarly, an employer which decides not to hire an applicant because of the adverse recommendation of a former employer is not liable (at least absent some form of negligence on its own part) if that third party's negative report was motivated by a discriminatory purpose.

In the instant case, a reasonable trier of fact could certainly conclude that Grado was carrying out his official duties when he took the actions which led to Peters' dismissal. *First*, bringing personnel problems to the attention of the human resources department was clearly among Grado's official duties. As BCI itself stipulated, "Mr. Grado was responsible for monitoring the employees working under his supervision, and when an employee had an attendance, performance, and/or disciplinary issue, he was responsible for bringing the issue to the attention of the BCI Human Resources Department."[4] *Second*, when a disciplinary matter was under consideration by the BCI human resources department, it was the responsibility of the relevant manager – here Grado – to "present the facts" to the human resources official. Pederson explained that as a human resources official she would "rely on management to give me th[e] facts"[5] and made decisions based on

---

[4] Memorandum in Support of Defendant's Motion for Summary Judgment, "Statement of Undisputed Material Facts" (p. 2), p. 4; see Declaration of Patricia Edgar, par. 2; Declaration of Cesar Grado, par. 8, 17; Declaration of Sherry Pederson, par. 2; Pet. Br. 5 ("under BCI's . . . system. . . . BCI supervisors such as Grado brought issues regarding employee discipline to the attention of Pederson [and] Edgar.").

[5] Pederson Deposition, p. 31.

"the facts presented to me" by the supervisor.[6] Grado described the role of a supervisor in similar terms. "I gather the facts and I present them to our HR department . . . I will put the facts in front of HR . . . I would present the facts to HR."[7] *Third*, there was substantial evidence that it was Grado (not Edgar) who on behalf of BCI made the critical (and incorrect) decision that Peters was not actually sick on September 30.[8] Clearly a decision as to what factual inferences an employer will draw from a body of information is "an official act of the enterprise, a company act," *Ellerth*, 524 U.S. at 762, requiring the exercise of delegated authority.

Regardless of whether Grado was biased, BCI objects that *other* company officials made a serious effort to prevent supervisors like Grado from engaging in racial discrimination. Human resources officials educated the workforce about Title VII, circulated anti-discrimination policies, and trained personnel such as Edgar to avoid discrimination. (Pet. Br. 33). But to the extent that Grado was using his official authority or otherwise carrying out his official responsibilities, Grado was as much an agent of

---

[6] Pederson Declaration, par. 11; see Pet. Br. 15 (Edgar acted on the basis of "the facts presented to her.").

[7] Grado Deposition, pp. 31-32.

[8] In a letter dated July 12, 2002, to the EEOC, Edgar (writing on behalf of BCI) stated:

> Respondent's attendance policy states that misrepresenting a reason for absence is dishonesty and grounds for immediate termination. As a result of Mr. Peters' actions, Mr. Grado reached the reasonable conclusion that he had simply decided not to work as scheduled.

(Letter of Patricia Edgar to Geraldine Herrera, July 12, 2002, p. 2) (Exhibit B to the EEOC Response in Opposition to Defendant's Motion for Summary Judgment).

BCI as Edgar or the head of the human resources department. Agency law imposes strict liability on an employer for the conduct of *all* of its agents, in part because doing so creates a greater incentive than the negligence standard urged by petitioner. W. Seavey, Handbook of the Law of Agency, 141 (1984).[9]

Petitioner argues that "BCI could not have done anything more to comply with the statute." (Pet. Br. 14). But there was, of course, more that Grado could have done; he could have chosen not to discriminate on the basis of race. What petitioner means is that, even if BCI supervisors or managers engaged in invidious discrimination, there was nothing more that the BCI human resources department could have done to prevent those violations. But whether the human resources department did all it could is beside the point; Title VII applies to all of BCI's officials, not just to its personnel workers. Agency law imposes on a principal liability for the actions of its agents because the principal, having retained those agents to conduct its business and standing to profit from their activities, can in return fairly be held responsible for the injuries inflicted by those agents in the course of their activities.[10] At BCI profits are generated, not by the human resources personnel, but by operational managers like

---

[9] 5 F. Harper, F. James & O. Gray, The Law of Torts, § 26.3, p. 15 (2d ed. 1986) ("Pressure of legal liability on the employer therefore is pressure put in the right place to avoid accidents. This reasoning has nothing to do with fault. It is true of course that liability based on a finding of the master's fault will put pressure on the employer to be careful. But the imposition of strict liability on an employer will exert even greater pressure. . . .").

[10] W. Seavey, Handbook of the Law of Agency, 141 (1984); 5 Harper, James & Gray, *supra*, § 26.5, p. 17; D. Dobbs, The Law of Torts, 908 (2000).

Grado, who actually solicit sales and deliver product, or who supervise those BCI employees who do. Grado is a profit center; Edgar is just overhead.

Finally, BCI complains that it would be impractical to oversee the activities, and detect any misconduct by, its thousands of employees, scattered as they are over a substantial number of states. (Pet. Br. 45). But it is the very purpose of agency law to impose responsibility and liability of that magnitude on principals that decide to hire a great number of agents in order to engage in a large commercial or other enterprise. BCI Coca-Cola is a subsidiary of Coca-Cola Enterprises, a multi-billion dollar corporation with vast assets and operations. The founders of that enterprise were not obligated to expand in this way, or to hire countless officials – like Grado – to staff an exceptionally successful corporate empire. The successors of Atlanta pharmacist Dr. John Pemberton, who invented Coca-Cola and originally brewed it in a kettle in his backyard, could have chosen instead only to make and deliver the beverage themselves; by doing so they could have avoided any need to supervise far flung subordinates, and any risk of liability for misconduct by persons other than themselves. Neither the owners of the very different and far more lucrative enterprise that emerged, nor subsidiaries like BCI, can justly complain if the magnitude of the vast operations that generate great income brings with it a commensurate degree of legal responsibility and potential liability.

II. EMPLOYER LIABILITY IS NOT LIMITED TO THE ACTIONS OF THE LAST AGENT INVOLVED IN A CHAIN OF DECISIONMAKING

Petitioner urges this Court to adopt a novel and quite extraordinary rule of agency law: when injury is sustained

as the result of a chain of decisionmaking by company officials, only the official who made the *last* decision is an agent of the employer. BCI frames this proposed rule somewhat opaquely, asserting that solely the "actual," "formal," or "true" decisionmaker is the agent of the employer. (Pet. Br. 20, 23, 47). The Fourth Circuit has aptly labeled this standard as requiring a discriminatory purpose on the part of "the ultimate decisionmaker." *Martin v. Mecklenburg County*, 151 Fed. Appx. 275, 280 (4th Cir. 2005). A chain of decisionmaking usually involves several decisionmakers. Petitioner's contention is that where a series of decisions, by several decisionmakers, result in the dismissal of an employee, only the last decision – to impose the sanction of dismissal – is legally "relevant." (Pet. Br. 15).

When BCI insists that Grado had no decisionmaking authority,[11] it is not denying that Grado had the power to make and actually made several decisions, e.g., the decision to call Edgar, the decision to provide certain information, the decision to not respond to Katt's phone calls, etc. Rather, BCI is asserting that only Edgar, and not Grado, had the power to make a particular decision, the decision to select dismissal – rather than, say, a suspension, or demotion, or a letter of reprimand – as the sanction to be imposed on Peters. Thus, BCI contends, when an employee is dismissed, only the official selecting that sanction acts as an agent of the employer.

There is simply nothing in agency law that supports this peculiar limitation on who is an agent. Petitioner's summary of argument opens with a straightforward assertion of agency law. "[P]rinciples of agency law . . . look

[11] Pet. Br. 16, 17, 19, 20, 23, 28, 40, 43.

to the employee who has 'principal responsibility' for the relevant employment decision. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998)." (Pet. Br. 14). But the quoted phrase "principal responsibility" does not appear anywhere in the decision in *Ellerth*; indeed, this apparently pivotal quotation never reappears anywhere in petitioner's brief at all.

Later, petitioner asserts that

> [a]n employer may be liable for the conduct of its agents acting within the scope of their actual authority, *or, specifically,* when an adverse employment action is taken by its formal decisionmaker with discriminatory animus. *Faragher*, 524 U.S. at 790; RESTATEMENT (THIRD) OF AGENCY, §§ 2.04, 7.03(2)

(Pet. Br. 19) (Emphasis added). But whether an agent was utilizing his or her authority (as was Grado) emphatically is not the same thing (petitioner uses the phrase "or, specifically" to suggest an equivalence) as whether an agent made the "formal" decision (i.e., the last decision, to impose dismissal as a sanction). (Equating the two standards in this manner is like saying "The permissibility of using a designated hitter is governed by the rules for the American League, or, specifically, the rules for the National League.") Neither the phrase "formal decisionmaker," nor the proposed equation of these two very different standards, is anywhere to be found in *Faragher* or the cited sections of the Restatement.

Petitioner's proposal that only the person who "formal[ly]" takes an employment action is the employer's agent would largely override established agency principles. On this view, so long as Edgar selected dismissal as the sanction to be imposed on Peters, no one else involved in the decisionmaking process could be considered an

agent of BCI. Those other decisionmakers would not be acting as BCI agents even if a decision to refer for discipline only blacks who object to Sunday work had been made by the BCI board of directors, or if a pretextual finding that Peters was loafing on September 30 (rather than actually sick) had been made by BCI's president.[12] Under that same approach, BCI would not be liable in tort if Grado had an accident while driving a delivery truck he knew had defective brakes, so long as it was Edgar who made the final decision to permit use of the truck and Grado had never told Edgar that the brakes did not work.

If this standard were adopted by this Court as a *general* rule of agency law, the ramifications would reach far beyond Title VII. The United States Code is replete with provisions whose applicability depends (like certain Title VII claims) on the existence of a particular intent or purpose. (Westlaw reports that more than 3,000 federal provisions use the term "intent.") Insofar as these laws apply to corporations, government bodies, or other entities

---

[12] Petitioner repeatedly argues that it should not be liable for discriminatory conduct by a "subordinate" official in the decisionmaking chain. (Pet. Br. 15, 16, 28, 29, 32, 43, 45, 47). But the logic of BCI's argument is fully applicable regardless of whether the earlier participants in that chain of events outranked Edgar.

In this case it is not clear in what sense, if any, Grado was the "subordinate." The record does not suggest that Edgar was Grado's supervisor, that she outranked him in some company system of job grades, that she supervised a larger number of actual subordinates, or that she was paid more than he was. This is, rather, a situation in which Edgar and Grado had been given different responsibilities within BCI and different roles to play in a disciplinary matter.

In the armed forces, the court martial convening authority will usually outrank the officers, and will always outrank any non-commissioned officers, who sit on the court martial panel and determine guilt and punishment.

of any size, their effectiveness and even viability would be substantially impaired if the only intent that mattered was the motive of the employee who made the last, formal decision in a decisionmaking chain. If, for example, supervisors at a government contractor prepared lavishly exaggerated statements of expenses and wrote up charges for costly but non-existent services, the False Claims Act would not be violated so long as the accountant who finalized and submitted the bill to the United States did not know what was going on. A wide range of statutes that govern the rights of corporations and legal relations among them – copyright, patent, securities, anti-trust, trade and other laws – would be seriously affected. It is perhaps for that reason that the National Chamber of Commerce does not endorse the extraordinary agency rule proposed by BCI, but insists instead that an employer is responsible for the misuse of *any* "delegated authority" by a company official.[13]

In the instant case, BCI contends that Grado accurately reported to Edgar what was occurring in the Albuquerque office. But on petitioner's view, it would not have mattered if Grado was lying through his teeth. BCI insists that it would not be liable even if what really happened was that Peters happily agreed to the requests from Katt and Grado that he work over the weekend, that Peters in fact put in a full day's work on Sunday, and that Grado nonetheless used his official position to sell Edgar a completely different story fabricated by Grado because he believed African-Americans are racially inferior. Similarly, if Grado acting for such an invidious purpose submitted

[13] Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner, 4, 16, 18, 20, 21.

time or sales records for Peters that understated the hours he had worked or the amount of sales for which he had earned commissions, on petitioner's view BCI would not be liable so long as the officials in the payroll department who underpaid Peters did not know that they were receiving inaccurate information.

The sole exception suggested by BCI to its proposed "formal decisionmaker" rule is an equally strange departure from agency law. An employer would be legally responsible for the motives of any person who had such "leverage or influence" that he could "impose his will" on or "dupe" the formal decisionmaker. (Pet. Br. 24).[14] Under BCI's theory, agency could be established by showing that some such other person had an overbearing personality (like the influence of the monk Grigori Rasputin over Tsar

---

[14] Petitioner also argues that Edgar was not Grado's "cat's paw." (Pet. Br. 14, 15, 23, 24, 28).

The charming fable at issue, created in the seventh century B.C. by the Greek writer Aesop, and put into verse by the seventeenth century French poet Jean de La Fontaine, has outlived its usefulness as a guide to the meaning of twenty-first century agency law.

In the Aesop fable, a monkey and a cat observe chestnuts roasting on a fire in the home of their owner. The monkey persuades the cat to pull the chestnuts from the fire, promising to share the chestnuts and flattering the cat with compliments about his feline dexterity. The cat (after an independent evaluation of the circumstances) is persuaded by the monkey, and pulls chestnuts from the fire, singeing his paw in the process. Unfortunately for the cat, he (like Edgar in dealing with Grado) had misjudged the motives of the monkey. While the cat is taking the chestnuts from the fire, the monkey eats them all.

Nothing that occurs in the employment context bears any resemblance to the tactics used by the monkey in this story. Supervisors do not persuade personnel officials to fire workers by promising to share some sort of bonus that the supervisor will receive as a result of the dismissal; employers do not provide financial rewards for adverse employment actions.

Nicholas II), wove a hypnotic trance (like the evil Svengali in George Du Maurier's nineteenth century novel *Trilby*), or used trickery to bamboozle the formal decisionmaker (as did Delilah in persuading Samson to disclose the source of his great strength.) It apparently would not matter, however, whether this other highly influential person was not an employee of the defendant. On the other hand, traditional agency considerations, such as delegated job responsibilities, the exercise of official power, or an intent to serve one's employer, could not be relied on to show that any other person was acting as an agent. Unsurprisingly, BCI does not point to anything in any version of the Restatement of Agency supporting such distinctions.

This proposed limitation on agency-based liability cannot be reconciled with the past decisions of this Court. In both *Ellerth* and *Faragher* this Court expressly acknowledged and applied the "agency principle[ ] of vicarious liability for harm *caused by* misuse of supervisory authority." *Ellerth*, 524 U.S. at 764 (emphasis added); *Faragher*, 524 U.S. at 577 (emphasis added); see *Meritor*, 477 U.S. at 70 (employer liable for use of delegated authority "*affecting* the employment status" of a worker) (emphasis added). *Reeves* reiterated that a discrimination plaintiff can prevail by demonstrating that an impermissible consideration "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome." 530 U.S. at 141 (*quoting Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (bracketed material in *Reeves*)).

Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) illustrates the principle that employer liability is not limited to situations in which the person actually

taking the adverse action acted with a discriminatory purpose. In *Lorance* the plaintiffs were demoted in 1982 as a result of the application of a seniority rule that had been adopted in 1979. There was no claim that the company officials who in 1982 actually ordered the demotion had themselves acted with an unlawful purpose; the alleged discriminatory purpose was on the part of earlier company and union negotiators who drafted the facially neutral seniority rule. Under BCI's view of agency law, the benign purpose of the 1982 demotion decision (taken by the "formal decisionmaker") would by itself have barred any Title VII claim; the earlier invidiously motivated rule adoption would have been legally irrelevant. This Court, however, agreed that the plaintiffs would have been entitled to relief if the invidiously motivated seniority rule had itself been the subject of a timely Title VII charge. 490 U.S. at 906-13.

Nothing like the rule proposed by petitioner exists in analogous areas of anti-discrimination law. If a government employee was targeted for discipline because he was African-American and found guilty of misconduct because he was a Baptist, no one would seriously claim that his dismissal was nonetheless constitutional because the official who then imposed the sanction of dismissal did not know what was going on. Similarly, if a defendant had been arrested by a biased police officer because he was Hispanic, indicted by a biased prosecutor because he was Catholic, and convicted by a biased jury because his parents were from Mexico, the defendant's resulting imprisonment would violate equal protection – and could be successfully challenged in a habeas corpus proceeding – regardless of whether the sentencing judge was personally unaware of those earlier discriminatory acts.

BCI's insistence on focusing solely on the last decision – in a dismissal case the decision to select termination as the sanction – makes little practical sense. In many situations that "formal decision" may be little more than a formality. In the instant case, for example, BCI's human resources officials insisted that their role was limited to (1) determining whether the "facts presented" by management constituted a violation of some BCI rule, and (2) determining what sanction was required for that particular violation.[15] BCI argues that the facts presented to Edgar clearly constituted flagrant insubordination, and that dismissal was the obvious penalty for such insubordination. Once Grado had decided to take the matter up with the Phoenix office, and "presented" the "facts" regarding the events of September 28-30, the result may well have been virtually a foregone conclusion. Similarly, in *Lorance* the "formal decisionmakers" who demoted the plaintiffs both properly and predictably applied the relevant rules to the circumstances before them; the critical decisions had been made by others several years earlier.

The agency rule proposed by BCI permits an employer to place largely outside the reach of Title VII almost all of the decisions leading to an adverse employment action. The employer could generally do so by giving responsibility for the "ultimate," sanction-fixing decision to an official who personally has no other role in the decisionmaking

---

[15] Declaration of Cesar Grado, par. 6 ("I bring the facts relating to the matter to the attention of our Human Resources Department. The Human Resources representative then makes the decision about which company policy or policies applies in the situation, if any, and the appropriate action to take based upon what has occurred."); Declaration of Sherry Pederson, par. 2; Pederson Deposition, pp. 30-31; see Pet. Br. 4 ("A Human Resources representative . . . determines whether a workplace policy applies to the situation and orders appropriate action.").

process. That was precisely the allocation of decisionmaking roles in the leading Fourth Circuit decision of *Hill v. Lockheed Martin Logistics Mgmt. Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc). In *Hill* the only decision made by the "actual decisionmakers" was to determine the level of sanction.[16] The National School Boards Association represents that school boards virtually always limit their role in disciplinary matters to selecting the appropriate sanction based on the recommendation of and information provided by school administrators. The Association insists that school boards have no legal responsibility under Title VII for any discrimination by those administrators.[17] Absolving employers in this manner of responsibility for any and all discriminatory actions occurring prior to the "ultimate decision" will immunize from the prohibitions of Title VII much, in some instances virtually all, invidiously motivated conduct. As a district court judge required to administer the Fourth Circuit's "ultimate decisionmaker" standard recently observed, "[t]he rule has the unfortunate potential to create a safe harbor for workplace discrimination by any

---

[16] The allegedly biased job site official was entirely responsible for initiating the disciplinary actions (a flurry of misconduct charges immediately following Hill's complaint of discrimination), making the relevant factual findings (allegedly knowingly inaccurate), and determining that the facts so found violated company rules. 354 F.3d at 282-83 (majority opinion), 300-01 (dissenting opinion).

[17] Brief of *Amicus Curiae* National School Boards Association in Support of Petitioner, 4-5:

> [M]ost school boards have no role in evaluating employees, in investigating employee complaints, or in developing recommendations for . . . discipline, or termination. . . . [S]chool boards rely on the recommendations and input of administrators to inform their . . . decisions. . . . [A] school board will only act based on the facts presented to it.

(Footnote omitted).

prejudiced supervisor who can fairly be described as not being the final decisionmaker on personnel decisions."[18]

BCI insists that an employer could not permit the "formal" decisionmaker to be the "conduit" of the biases of other officials. (Pet. Br. 23, 47-48). But a decisionmaking process in which different decisionmakers are responsible for distinct decisions is by definition one in which the later decisionmakers are conduits for the actions and purposes of those who acted earlier. In this case Edgar worked 470 miles from the Albuquerque office; she had never met Peters, did not have a copy of his personnel file, and concluded (since it was Grado's job to "present the facts") that there was no need to hear Peters' side of the story or talk with Peter's immediate supervisor, Katt. BCI insists that Edgar was not "isolated" from what was really happening; as a practical matter, the "formal" decisionmaker in this situation would hardly have been more isolated if BCI had outsourced its personnel decisions to an office in Bangalore. The problem, however, concerns not isolation but the very nature of this type of decisionmaking process. Whenever an employer takes action on the basis of a chain of decisionmaking, the acts of an official who participates at an earlier stage in the process always have the potential to turn the events that follow into a conduit for achieving his or her purposes.

III. AN EMPLOYER IS LEGALLY RESPONSIBLE FOR INJURIES CAUSED BY THE DISCRIMINATORY CONDUCT OF ITS AGENTS

Title VII imposes liability on an employer for an adverse action brought about by the discriminatory conduct of one of

---

[18] Petition for Writ of Certiorari, *Sawicki v. Morgan State University*, No. 06-306, App. 20a.

its agents.[19] When a biased supervisor personally decides to fire a worker, the causal connection between that decision and the resulting injury is obvious; the decision causes injury because it invariably leads other officials to take the specific acts which directly inflict harm – the payroll department stops issuing paychecks and the front desk or gate no longer permits the worker to enter the office or plant. When the alleged discriminatory official did not directly order the adverse action, the plaintiff must make two specific demonstrations. First, the plaintiff must prove that the biased official in question took some act with a discriminatory purpose.[20] Second, the plaintiff must

---

[19] In some situations the discriminatory conduct that brought about the injury will itself have occurred so long before that injury that it lies outside the 180 or 300 day charge filing period. If, as in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the conduct mandates a particular adverse action, which is postponed for some specific period of time (in *Ricks*, for a year), the employee may have to file a charge without awaiting that injury. Similarly, if (as in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977)), the discriminatory conduct causes a substantial injury at the time when it occurs (e.g., a discriminatory layoff), the employee must file a charge at that point, and cannot do so for the first time only when subsequent developments give that discriminatory act additional impact (e.g., a second layoff because of the failure to accrue seniority during the first layoff period).

On the other hand, in some cases the initial discriminatory act may have little or no practical consequence at the time, and may affect the employee only because of subsequent developments. For example, under a progressive discipline system, a worker might receive only a letter of reprimand for his or her first infraction (an action with no economic or other consequence), and later be fired because a subsequent infraction was his or her second. If in such a situation a worker is cited for a first infraction by a discriminatory supervisor, Title VII does not require the worker to file a charge with EEOC, and ultimately a lawsuit, to challenge a discriminatory action which as yet has not had, and might never have, any significant adverse impact.

[20] Under section 703(m) of Title VII, the plaintiff need only prove that an invidious purpose was "a motivating factor" behind the act in

(Continued on following page)

demonstrate that this improperly motivated conduct actually caused the adverse action that injured the plaintiff. The plaintiff must establish but-for causation: if the improperly motivated conduct had not taken place, the complained-of-injury would not have occurred.

Resolution of the issue of but-for causation will often turn largely on the trier of fact's assessment of the credibility of the officials involved. The respective actions of those various officials may consist of verbal exchanges (in this case, a series of telephone calls), and all the relevant witnesses are likely to be employees of the defendant. Written allocations of decisionmaking roles may not exist, and even if extant might not have been followed. In some instances causation may depend largely on the thought process of a particular official; did he or she, for example, give any weight to the recommendation of another, allegedly biased official? However specific, consistent, and self-exonerating the testimony of the defendant's officials, it will usually be for the trier of fact to decide, at times based largely on demeanor and cross-examination, whether their testimony is to be believed. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000).

The circumstances of this case illustrate the critical role of the trier of fact. On the day that Peters was dismissed on October 2, 2001, he was given a written statement signed by Grado and Pederson explaining the dismissal was based on his failure to come to work on

---

question. If the employer demonstrates that the discriminatory official would for other reasons have taken the same act, even absent that impermissible motivating factor, the employer is still liable, but the remedies available are substantially limited. 42 U.S.C. § 706(g)(2)(B).

September 30.[21] That same explanation was repeated on October 16, 2001, in a written statement submitted by Pederson to the New Mexico Department of Labor.[22] In November 2001, Edgar wrote to the EEOC offering a second, perhaps more persuasive account, stating that Peters was fired because, having promised to bring Pederson and Grado a note from his physician, Peters failed to do so.[23] In July, 2002, Edgar gave the EEOC a third, possibly even more convincing explanation, insisting that Peters was dismissed because Grado concluded that Peters had lied to Katt about being sick on Sunday, September 30.[24] Finally, in February 2004, Edgar signed, in support of BCI's motion for summary judgment, a statement with yet a fourth account, explaining that she had fired Peters because his remarks to Edgar on Friday, September 28 were an act of insubordination. The 2004 declarations by Edgar and Grado regarding their respective roles in the decisionmaking process are consistent with Edgar's 2004 account of why Peters was dismissed, but not with Edgar's July 2002 explanation, with Edgar's November 2001 explanation, with Pederson's October 2001 explanation, or

---

[21] Defendant's Motion for Summary Judgment, Exhibit B-3. The notice, evidently written by Grado, stated "I explained how [the order to work on September 30] was a direct order and failure to comply with the directive would be considered insubordination. . . . You did not report on Sunday 9-30-01, and therefore your employment is being terminated for insubordination."

[22] Plaintiff EEOC's Response in Opposition to Defendant's Motion for Summary Judgement, Exhibit I ("[Peters] was told by Cesar Grado that if he didn't show up, it would be considered insubordination.").

[23] *Id.*, Exhibit J ("Mr. Peters told Mr. Grado and the local HR Administrator, Sherry Perderson, in a meeting that he had a doctor's note, but he did not provide one.").

[24] See n.8, *supra*.

with the explanation set forth in the dismissal statement signed in October 2001 by Grado and Pederson.

BCI's summary judgment motion relied heavily on the type of interested, unverifiable testimony which the trier of fact, although permitted to accept, is not required to believe. In declarations filed some three years after Peters was dismissed, Edgar and Grado provided (largely for the first time) pointedly detailed descriptions of exactly what they had said to one another in private telephone conversations on September 28 and October 1, 2001.[25] Edgar and Grado also swore to highly nuanced accounts of their respective motives in each of those conversations.[26] BCI repeatedly insists that all this self-exonerating testimony was "undisputed." (Pet. Br. 11, 15, 37, 39). It is, of course, true that no one but Edgar and Grado was on the phone during the critical conversations, and that only Edgar and Grado, respectively, had personal knowledge of what was

---

[25] According to those accounts, Grado offered no recommendations, made no requests regarding how Peters was to be dealt with, never disparaged Peters, only asked Edgar for help in solving his staffing problem, and did not "confer" with Edgar about whether or how Peters should be disciplined. (Pet. Br. 8, 9 n.4, 25). For her part, Edgar assertedly never asked Grado's views about the matter, and carefully instructed Grado to find out if Peters had called in to Katt about being absent on September 30. (Pet. Br. 9, 25).

[26] Grado insisted that when he first called Edgar his sole purpose was to seek advice about his authority to order Peters to work on his day off, that he never envisioned or intended that the call would lead to any disciplinary action (Pet. Br. 37, 39, 49), and that at no point in any of the conversations did he intend to influence what Edgar would decide. (Pet. Br. 24). Edgar recalled with equal clarity that it was she who concluded, from the fact that Peters had called Katt rather than Grado, that Peters was not really sick (Pet. Br. 11, 25-26; but see n.8, *supra*), and that she decided to fire Peters because of insubordinate remarks on Friday, September 28, not because he failed to go to work on Sunday, September 30. (Pet. Br. 26 n.9, 27 n.10).

on her or his mind during those critical days. But that circumstance does not provide the solution to this controversy; rather, it frames the very problem that the trier of fact must resolve. Were such self-serving statements about matters known directly only to the defendant's own employees deemed conclusive, few Title VII claims would ever survive to trial. *Reeves* makes clear that it is ordinarily for the trier of fact to decide whether such accounts are reliable and credible, or are merely clever after-the-fact explanations contrived to explain why a worker who had permission from his supervisor not to work on Sunday, September 30, and who was in fact sick on that day, was nonetheless later told that he was being fired for not working on September 30.

BCI contends that, regardless of the nature of a discriminatory official act or the way in which it might tend to lead to an adverse action, there is one method by which an employer always can prove that that discriminatory act did not cause any subsequent adverse action; the employer need only demonstrate that the final decisionmaker made an "independent evaluation" of the facts. (Pet. Br. 48). The Tenth Circuit took a different approach, holding that an employer always can prove that an alleged discriminatory act did not cause a subsequent adverse action by demonstrating that the final decisionmaker made an "independent investigation" of the relevant facts. (Pet. App. 21a). Neither of these proposed per se rules adequately takes into account the wide variety of ways in which such a discriminatory act would lead to the dismissal of, or some other adverse action against, an employee.

There are, to be sure, situations in which a finding that the final decisionmaker made such an independent

evaluation would demonstrate the lack of the requisite causation. If the sole alleged discriminatory act was a biased recommendation that an employee be dismissed, an employer would prevail if the trier of fact concluded that the ultimate decisionmaker had expressly disregarded any recommendations, and had made an independent, de novo evaluation of the evidence and appropriate sanction. But such an independent evaluation would be entirely ineffective in breaking the causal connection if the discriminatory action at issue consisted of providing the final decisionmaker with false inculpatory evidence. (Regardless of whether a jury independently evaluates the evidence before it, a conviction would not be valid if the defendant was arrested, searched and prosecuted because of his race, or if the prosecutor knowingly introduced highly inculpatory perjured testimony.)

Similarly, an independent investigation would break the causal connection if the discriminatory act was providing inaccurate information, and that independent investigation led the ultimate decisionmaker to disregard that misinformation, and to base an adverse decision on other, untainted evidence. But such an independent investigation would be beside the point if the discriminatory act was not providing false information but making a biased recommendation (e.g., to fire rather than merely reprimand the worker), and the ultimate decisionmaker – after personally looking into the facts – gave dispositive weight to that tainted recommendation.

In all cases, exculpatory evidence proffered by an employer to show that the adverse action was not caused by an earlier discriminatory act must specifically address the particular type of discriminatory act alleged, and the

manner in which that act assertedly brought about the disputed adverse action.

Where an employer confers upon a given official the authority to take a significant step in the disciplinary (or other decisional) process, and the official uses that authority to take a discriminatory act likely to cause injury, it will not invariably be the case that a second official – at a later point in the process – will be able to remove the resulting taint of the decisionmaking process. In the instant case, for example, the government contends that Grado engaged in race-based selective reporting, notifying Edgar that Peters had refused to work on a weekend, even though Grado would not have so reported a white or Hispanic worker who had done the same thing. If such selective reporting indeed occurred, nothing thereafter done by some other BCI official could eliminate the but-for causation; if Peters had been white or Hispanic, Edgar would not have been called, Grado would not have issued an ultimatum, Pederson would never have been asked to pull Peters' old file, and no one would have questioned Peters' bona fides when he called in sick. BCI, having opted to give Grado control over whether to take the steps that would trigger a disciplinary process, cannot complain if as a practical matter no other official was thereafter in a position to undo the resulting impact of that biased act on the decisionmaking process. Under Title VII, unlike friendly games of golf, there are no mulligans.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

ERIC SCHNAPPER
Counsel of Record
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

MARISSA TIRONA
Program Director
NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION
44 Montgomery Street, Suite 2080
San Francisco, CA 94104
(415) 296-7629

THEODORE SHAW
Director-Counsel
NORMAN J. CHACHKIN
JACQUELINE A. BERREN
ROBERT H. STROUP
MELISSA S. WOODS
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, NY 10013-2897
(212) 965-2200

Counsel for Amici

690

FILED

No. 06-341

IN THE
SUPREME COURT OF THE UNITED STATES

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

FRANCISCO M. NEGRÓN, JR.*
General Counsel
LISA E. SORONEN
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 DUKE STREET
ALEXANDRIA, VA 22314
(703) 838-6722

**Counsel Of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... **iii**

INTEREST OF AMICUS CURIAE **1**

SUMMARY OF THE ARGUMENT **1**

ARGUMENT **3**

I. The Practical Realities of School Board Operations Make It Unreasonable To Impute the Unsanctioned, Discriminatory Animus of Subordinates to School Boards Acting As Impartial, Actual Decision-Makers 3

A. A school board's limited and removed role in personnel actions make it unlikely that a Board will uncover racial animus of subordinates..... 3

B. Holding school boards liable for the unsanctioned, discriminatory acts of subordinates when the affected employee failed to inform the school board about the discrimination undermines proactive measures to advance anti-discrimination efforts and encourages needless litigation 8

II. Requiring a School Board To Investigate Discriminatory Animus on the Part of Informing Subordinates To Avoid Liability Is Unsupported by Title VII And Other Precedent, and Imposes Unnecessary and Counter-Productive Burdens..... 12

A. Neither the plain language of Title VII nor prior Supreme Court precedent supports imposing an investigation requirement on employers 14

B. Requiring a school board to investigate before taking any adverse employment action is burdensome, duplicative of other steps school boards have taken to eliminate discrimination, and may not be productive 17

C. Requiring a school board to investigate possible discriminatory animus whenever a subordinate has recommended an adverse employment action discourages employees from fulfilling their duty to minimize the harm of discrimination 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Auguster v. Vermilion Parish Sch. Bd.,
249 F.3d 400 (5th Cir. 2001) 21

Baynard v. Malone,
268 F.3d 338 (4th Cir. 2001) 22

Bender v. Hecht's Dep't Stores,
455 F.3d 612 (6th Cir. 1996) 16

Bishop v. Wood,
426 U.S. 341 (1976) 16

Burlington Industries Inc. v. Ellerth,
524 U.S. 724 (1998) 11, 15

Cardoso v. Robert Bosch Corp.,
427 F.3d 429 (7th Cir. 2005) 16

Doe v. School Admin. Dist. No. 19,
66 F.Supp.2d 57 (D. Me. 1999) 22

EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476 (10th Cir. 2006) 7, 13, 15, 19

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 8, 20

Forrester v. Rauland-Borg Corp.,
453 F.3d 416 (7th Cir. 2006) 21

Hill v. Lockheed Martin Logistics Management, Inc.
354 F.3d 277 (4th Cir. 2004) 13

Hutson v. McDonnell Douglas Corp.,
63 F.3d 771 (8th Cir. 1995) 16

Iduoze v. McDonald's Corp,
268 F.Supp.2d 1370 (N.D. Ga. 2003) 14

Kramer v. Logan County Sch. Dist.,
157 F.3d 620 (8th Cir. 1998) ..... passim

Mateu-Anderegg v. School Dist. of Whitefish Bay, 304 F. 3d 618 (7th Cir. 2002) ..... passim

P.H. v. School Dist. of Kansas City,
265 F.3d 653 (8th Cir. 2001) 22

Riser v. Target Corp.,
458 F.3d 817 (8th Cir. 2006) 16

Rose v. New York City Bd. of Educ.,
257 F.3d 156 (2d Cir. 2001) 23

Russell v. McKinney,
235 F.3d 219 (5th Cir. 2000) 14

Scales v. Slater,
181 F.3d 703 (5th Cir. 1999) 21

Schreiner v. Caterpillar, Inc.
250 F.3d 1096 (7th Cir. 2001) 23

Sivera v. Orange County Sch. Bd.,
244 F.3d 1253 (11th Cir. 2001) 21

Spearman v. Ford Motor Co.,
231 F.3d 1080 (7th Cir. 2000) 14

Stalter v. Wal-Mart Stores, Inc.
195 F.3d 285 (7th Cir. 1999) 14

Waters v. Churchill,
511 U.S. 661 (1994) 14, 15, 21

Young v. Dillon Co.,
468 F.3d 1243 (10th Cir. 2006) 16

Statutes and Regulations

42 U.S.C. § 2000e-2(a)(2) 18

Age Discrimination in Employment Act,
29 U.S.C. § 621 *et. seq.* 10

Americans with Disabilities Act,
42 U.S.C. § 12101 *et seq.* 10

Section 1981 of the Civil Rights Act of 1866,
42 U.S.C. § 1981 10

Section 1983 of the Civil Rights Act of 1871,
42 U.S.C. § 1983 10

Section 504 of the Rehabilitation Act,
29 U.S.C. § 794 10

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d 10

Title VII of the Civil Rights Act of 1964 42 U.S.C. § 2000e 10

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq* 10

Conn. Gen. Stat. Ann. § 10-220(a)(3) (2007) 4

Fla. Stat. § 1001.49(2) *et seq.* (2006) 6

Ky. Rev. Stat. Ann. § 164.340 (West 2006) 4

La. Rev. Stat. Ann. § 42:1165A (2006) 4

Mo. Ann. Stat § 174.090 (West 2006) 4

Va. Code Ann. § 22.1-315 (2006) 4

Wis. Stat. § 118.22(2) (2006) 4

Other Authorities

BECOMING A BETTER BOARD MEMBER 7, National School Boards Association (2006) ..... passim

Education Commission of the States, Teacher Tenure/Continuing Contract Laws for 1998 (1998), *available at*, http://www.ecs.org/clearinghouse/14/41/1441/htm. 5

Education Commission of the States, State Collective Bargaining Policies for Teachers (2002), *available at*, http://www.ecs.org/clearinghouse/37/48/3748.pdf 5

EEOC Enforcement Statistics, *available at,*
http://www.eeoc.gov/stats/race.html 17

INTEREST OF *AMICUS CURIAE*[1]

Founded in 1940, the National School Boards Association (NSBA) is a not-for-profit federation of 49 state associations of school boards across the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA also represents the nation's 95,000 school board members who, in turn, govern approximately 15,000 local school districts that serve more than 47 million public school students. The NSBA Council of School Attorneys is the national professional association for attorneys who represent school districts. NSBA is dedicated to the improvement of public education in America and has long been involved in advocating for reasonable application of federal non-discrimination laws in a manner that preserves the rights of public employees while recognizing the special concerns and operational realties of public school systems.

NSBA submits this brief to emphasize the significant adverse impact that the Tenth Circuit's decision, if left intact, would have on the operation of our nation's schools.

SUMMARY OF ARGUMENT

This case presents the strong possibility of serious unintended consequences for the nation's school districts if this Court renders a decision that fails to recognize and account for the particular legal requirements and governance realities that dictate school board operations.

---

[1] This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members and counsel made any monetary contribution to the preparation or submission of this brief.

Under many state statutes, school boards are the final decision-makers in many school employment decisions, including hirings, firings, and promotions, that are subject to Title VII and other non-discrimination statutes. At the same time, as a matter of sound governance, school boards generally are not involved in the day-to-day operation of schools and necessarily rely on the judgment and recommendations of their school administrators in rendering these personnel decisions. If anything, current trends are toward less board involvement in the operational minutiae of school districts, with boards focusing more of their attention and oversight on the broad academic and civic mission and sound overall operations of public schools. School districts also have put in place many other procedural safeguards to protect employees from discrimination.

In requiring an employer to investigate for possible racial bias in a subordinate's personnel decision, even in the absence of any evidence of such bias, the Tenth Circuit's approach to this case fails to account for these realities among school boards and similarly situated employers. The Tenth Circuit's holding is unsupported by Title VII itself or by this Court's holdings, and its apparent rationales—that employers may intentionally isolate final decision-makers to avoid responsibility for bias and that bias could be unearthed if employers tried harder—are irrelevant in the school board context. Affirming the Tenth Circuit would ignore—and indeed undermine—the existing safeguards school boards utilize.

ARGUMENT

I. The Practical Realities of School Board Operations Make It Unreasonable To Impute the Unsanctioned, Discriminatory Animus of Subordinates to School Boards Acting as Impartial, Actual Decision-Makers.

A. A school board's limited and removed role in personnel actions makes it unlikely that a board will uncover racial animus of subordinates.

The statutorily defined role and responsibilities of school boards and the operational realities of public school systems create obstacles that limit the probability that school boards charged as final decision-makers in employment matters will discover the racial animus of subordinates who may have been part of the personnel process. These obstacles make it unreasonable to impose liability on school boards for the unknown racial animus of subordinates.

School boards are responsible for governing the school district and do so mostly through policy-making, not direct involvement in the daily operation of schools.[2] In most jurisdictions, school boards intersect with personnel actions in two primary ways. First, school boards are responsible for promulgating rules and policies that set the terms of employment and govern employee behavior, including discipline.[3] Second, by virtue of state law, in most

---

[2] BECOMING A BETTER BOARD MEMBER 7 (National School Boards Association 2006). ("A major function of any school board is to develop and adopt policies that spell out how the school district will operate.").

[3] *Id.* at 8. ("The board is responsible for establishing policy governing salaries and salary schedules, terms and conditions of employment, fringe benefits, leave, and in-service training.").

states school boards are the actual decision-makers in employment matters, including hiring and firing employees.[4]

School boards do not directly manage and supervise employees—administrative functions delegated primarily to the superintendent.[5] In fact, most school boards have no role in evaluating employees, in investigating employee complaints, or in developing recommendations for hiring, discipline, or termination.[6] Instead, in most instances, the

---

[4] *Id.* at 170. ("In most states, the school board is the ultimate employer of all district employees—a fact that carries the appropriate legal baggage of responsibility and accountability."). *See, e.g.*, WIS. STAT. § 118.22(2) (2006) ("No teacher may be employed or dismissed except by a majority vote of the full membership of the board."); VA. CODE ANN. § 22.1-315 (2006) ("Nothing in this section shall be construed to limit the authority of a school board to dismiss or place on probation a teacher or school employee pursuant to Article 3 § 22.1-306 *et seq.* of this chapter."); LA. REV. STAT. ANN. § 42:1165A (2006) ("All job actions based upon the causes for disciplining or dismissal of teachers or other public school employees, as may be now or hereafter set forth in the state tenure statutes, shall remain under the exclusive jurisdiction of the appropriate parish or city school board."); MO. ANN. STAT. § 174.090 (West 2006) ("A majority of the members of the board shall constitute a quorum for the transaction of business, but no appropriation of money nor any contract which shall require any appropriation or disbursement of money, shall be made, nor teacher employed or dismissed, unless a majority of all the members of the board vote for the same."); CONN. GEN. STAT. ANN. § 10-220(a)(3) (2007) ("Each local or regional board of education ... shall employ and dismiss the teachers of the schools of such district subject to the provisions of sections 10-151 and 10-158a."); KY. REV. STAT. ANN. § 164.340 (West 2006) ("A majority of the members of the board shall constitute a quorum for the transaction of business, but no appropriation of money shall be made nor any contract that requires a disbursement of money shall be authorized, and no teacher employed or dismissed, unless a majority of all the members of the board vote for it.").

[5] BECOMING A BETTER BOARD MEMBER at 7. ("But although boards set policy, they do not carry it out. The responsibility for implementing policy is delegated to the superintendent of schools.").

[6] *Id.* at 174. ("Prudent boards set out policy guidelines for evaluating their employees, just as they do for evaluating the superintendent. Boards almost always delegate the actual evaluating to the

school district administration is responsible for the day-to-day operations of the school district, including managing employees.[7] Ultimately, school boards rely on the recommendations and input of administrators to inform their hiring and firing decisions. Typically the superintendent relies on associate superintendents, area directors, principals, and supervisors to evaluate, supervise, train, and discipline school district employees and recommend employees for hiring and termination.

Where employees have no property or liberty interest in their employment,[8] or no statute or collective bargaining agreement requires a hearing, school boards generally will rely only on the recommendation of subordinates in making a decision to terminate. In that instance, a school board will consider the facts as presented by the superintendent or other administrator when reaching a decision. Unless an issue of discrimination is raised by the affected employee, a school board will only act based on the facts presented to it. As a matter of course, a school board at that point will not be in a position to identify *sua sponte* whether racial bias played any part in the recommendation.

---

superintendent, however, or to other members of the administrative or supervisory team.").

[7] *Id.* at. 8. ("Unless otherwise specified in state statutes or board policy, a board exercises daily supervision and control primarily through its chief administrator and does not directly deal with staff members employed to assist the superintendent in implementing board directives.").

[8] School district employees have a property interest in their job by virtue of state law or a collective bargaining agreement granting them tenure or contract rights to continued employment. Teachers in most states have tenure rights after two or three years of employment. *See* Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Updated for 1998 (1998), http://www.ecs.org/clearinghouse/14/41/1441.htm. About two-thirds of states have collective bargaining laws, many including all public employees. *See* Education Commission of the States, State Collective Bargaining Policies for Teachers (2002), http://www.ecs.org/clearinghouse/ 37/48/3748.pdf.

Relying on the information and recommendation of a superintendent in this instance, even if doing so does not reveal racial animus where it might exist, is not unreasonable. First, the school board is accustomed to relying on information from the superintendent to inform its policy-making and decision-making functions.[9] Second, the school board has good reason to rely on a superintendent's recommendations in general. In the majority of jurisdictions, the school board has carefully selected the superintendent to be its top administrator and expects him or her to be well-versed in and to act in accordance with all the district's policies, including its anti-discrimination policies.[10] And where elected, the superintendent is generally charged by law "to advise and counsel with the district school board on all educational matters and recommend to the district school board for action such matters as should be acted upon."[11] Third, the school board has good reason to rely on a superintendent's recommendation regarding employment matters. The superintendent, either through directly supervising the employee or through working with the employee's direct supervisor, is in a far better position than the board to understand and report the facts supporting the reasons for the recommended termination and the credibility of the employees involved.

Where employee property interests are at stake, whether by virtue of state statute or through a collective bargaining agreement, school boards would be in a better position to determine whether racial bias was a factor because school boards are required to hold hearings. In a

---

[9] BECOMING A BETTER BOARD MEMBER at 129. ("Your superintendent should provide you the information you ask for when it is available. If it is not easily available, your superintendent should explain what effort is required to obtain it.").

[10] *Id.* at 135. ("Selecting a new superintendent is perhaps the most important decision your board will ever make.").

[11] *See, e.g.*, FLA. STAT. § 1001.49(2) *et seq.* (2006).

hearing to contest an adverse employment action, an employee can raise issues of discrimination or bias and have a full and fair opportunity to have those claims impartially considered and resolved, thus rendering it unnecessary to impute any discriminatory intent of subordinates to the actual decision-maker.

But even the availability of these hearings does not necessarily ensure disclosure to the board of potential racial animus by subordinates. *See, e.g., Mateu-Anderegg v. School Dist. of Whitefish Bay*, 304 F.3d 618 (7th Cir. 2002) (teacher recommended for non-renewal withdrew request for a hearing, stating she did not agree with reasons given for non-renewal, but failing to raise any concerns about discrimination); *Kramer v. Logan County Sch. Dist.*, 157 F.3d 620, 624 (8th Cir. 1998) (school board held a five-hour hearing over non-renewal of teacher, at which teacher represented by counsel never presented any allegations or evidence of gender discrimination).

In the case at bar, the Tenth Circuit cited two justifications for holding the employer liable for subordinate discrimination of which the actual decision-maker was unaware, neither of which accurately reflects the practical challenges school boards and other public employers face when making employment decisions. First, the Tenth Circuit reasoned that imputing subordinate bias to the employer would deter employers from establishing elaborate chain-of-command systems where actual decision-makers are purposely insulated from information about the racial bias of subordinates specifically to avoid liability under Title VII. *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 486 (10th Cir. 2006). This concern is misplaced in the school board context. School boards, which by their function and purpose are removed from daily employment situations, make hiring and firing decisions because state law requires them to do so, not because this system best protects them from liability for unlawful discrimination. Likewise,

the appropriate distance of school boards from the day-to-day operations of the school district, which impedes boards from uncovering the racial animus of subordinates on whom they must necessarily rely for relevant information, derives from the statutory responsibilities and operational realities of school systems and not from any intent to avoid liability under federal non-discrimination laws.

Second, the Tenth Circuit seemed to assume that if actual decision-makers just tried harder to uncover discriminatory animus, they would find it where it exists. *Id.* ("Indeed such claims have the salutary effect of encouraging employers to verify information and review recommendations before taking adverse employment actions against members of protected groups—particularly if, as we have held, an employer can escape liability entirely by performing an independent investigation."). However, as *Mateu-Anderegg*, 304 F.3d 618, and *Kramer*, 157 F.3d 620, illustrate, even the availability of a full evidentiary hearing prior to making an employment decision will not necessarily reveal evidence of discriminatory bias.

B. Holding school boards liable for the unsanctioned, discriminatory acts of subordinates when the affected employee failed to inform the school board about the discrimination undermines proactive measures to advance anti-discrimination efforts and encourages needless litigation.

The primary purpose of Title VII is to prevent discrimination. *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-806 (1998) ("Although Title VIII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination,' [citations omitted], its 'primary objective' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.") The

preventive purpose of Title VII is not advanced by a rule that allows an employee to sue his unsuspecting employer where (i) the ultimate decision-maker actually did not harbor discriminatory animus toward the employee and (ii) the employee declined an opportunity to inform the ultimate decision-maker that the lower-level supervisor harbored such bias. As discussed below, this Court should reject a "cat's paw" theory of imputed liability in cases where the employee unreasonably declined to share with the ultimate decision-maker that discrimination was a genuine concern that needed to be investigated. *See generally Kramer*, 157 F.3d at 629 (Hansen, J., dissenting) (expressing concern that employee had "sandbagged" her employer by not revealing concerns about discrimination during a five-hour school board hearing and then "blindside[d]" board with subsequent Title VII lawsuit). Where school boards have numerous mechanisms in place for receiving and responding to complaints of discrimination, holding the school board liable for the racial animus of a subordinate about which the board knew nothing encourages litigation by allowing employees to circumvent the school system's non-discrimination policies and procedures until it is too late for the school system to take corrective action. Prompting needless litigation where viable administrative remedies exist serves no public purpose and hinders rather than forwards the goals of Title VII.

Aside from formal hearings related to employment actions, concerns about discriminatory actions also could be raised at regular school board meetings where members of the community, including school district employees, can address the board directly by asking to be placed on the agenda or speaking during the public comment period.[12] Moreover, school boards typically have complaint procedures that any citizen can use to raise their concerns

---

[12] BECOMING A BETTER BOARD MEMBER at 44. ("Your board should have a policy on how citizens can request speaking time, when they can speak, how many citizens can speak, and how long they can speak.").

through the district's chain-of-command, ending with consideration by the board. If a person raising a complaint is not satisfied by working with administrators, he or she can ultimately raise the issue with the entire school board.

Even more to the point, school boards, as public employers and recipients of federal funds, are bound by numerous federal and state constitutional and statutory equal protection and non-discrimination mandates, including Title VII.[13] In an effort to comply with these wide ranging laws, virtually all school districts adopt non-discrimination policies with respect to provision of services and employment practices,[14] develop complaint and administrative procedures specifically for employees,[15] and disseminate these policies and procedures through various means including district policy manuals, employee handbooks, and in service training. These policies typically include procedures for reporting and investigating discrimination complaints to ensure employees have an

---

[13] Among the federal non-discrimination laws that apply to school districts are: Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*.

[14] BECOMING A BETTER BOARD MEMBER at 171 (Noting that a typical hiring policy will include an equal employment opportunity clause and a nondiscrimination statement.).

[15] *Id.* at 177 ("A grievance procedure should begin with an informal attempt to resolve the problem with the employee's immediate supervisor. If the initial step doesn't provide relief the complainant finds satisfactory, most grievance procedures allow for a written complaint and response at the same level. Then, subsequent appeals move along, step-by-step, up through the chain of command. Finally, if the employee still is not satisfied with the administrative response, a typical grievance procedure allows for further appeal in the form of a hearing before the superintendent, or in some cases, before the school board.").

opportunity to have their concerns addressed and resolved at the earliest point possible.

Many school board policies oblige all employees, including supervisors, to report discriminatory behavior in order to ferret out unlawful discrimination from the outset of an impermissible act. For these processes to be most effective, employees must come forward and raise discrimination issues with the employer *before* filing a lawsuit. This Court recognized the importance of encouraging employees to bring forward evidence of discrimination immediately when it limited employer liability under Title VII to the extent the employer takes reasonable steps to prevent and address discrimination by encouraging employees to report discrimination. *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) ("To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.").

Allowing an employee to bring a Title VII claim where the employee never informed the actual decision-maker about possible racial animus of a subordinate, despite the availability of mechanisms to do so, would encourage employees to disregard the reporting mechanisms, denying their workplace colleagues and employers the benefit of having such policies in the first place. Furthermore, by providing the employee no incentive to bring forth a claim for the employer's immediate consideration and resolution, the employer is denied the opportunity to remediate the alleged discriminatory acts.

An employee who skips an opportunity to raise concerns about discrimination should not be rewarded with a federal cause of action for discrimination premised on a "cat's paw" theory of liability. Yet this is exactly what happened in *Mateu-Anderegg*, 304 F.3d 618, and *Kramer*, 157 F.3d 620, 624, and it is what is likely to happen in the

future if the Court embraces the Tenth Circuit's analysis in *BCI*. In *Mateu-Anderegg*, the plaintiff declined the opportunity for a statutory non-renewal hearing before the school board, yet the court of appeals still held that the principal's alleged bias was attributable to the school board. Similarly, in *Kramer*, although the teacher participated in a five-hour hearing before the school board, neither she nor her attorney ever uttered a word about discrimination; nonetheless, the two-judge majority affirmed a $125,000 judgment in her favor. While the court found it "troubling" that the teacher was silent about discrimination at the lengthy board hearing, the court nonetheless decided it was a jury question whether the school board had "accurately assessed" the teacher's situation. *Id.* at 624. A dissenting judge found that the board's review had been thorough, not perfunctory. *Id.* at 626.

Imputing racial bias to a school board, or even requiring a school board to know that racial bias existed, while denying the board the ability to use proactive measures to address discrimination, shifts the impetus away from a proactive and collaborative resolution towards needless adversarial litigation.

II. Requiring a School Board To Investigate Discriminatory Animus on the Part of Informing Subordinates To Avoid Liability Is Unsupported by Title VII and Other Precedent, and Imposes Unnecessary and Counter-Productive Burdens.

According to the Tenth Circuit, an employer can avoid liability for a subordinate's racial animus by independently investigating the allegations against the employee.

> . . .[B]ecause a plaintiff must demonstrate that the actions of the biased subordinate caused the employment action, an employer can avoid liability by conducting an independent investigation of the allegations against an employee. In that event, the employer has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated. . . . [S]imply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory.

BCI, 450 F.3d at 488.

There is no investigation requirement under Title VII, and one should not be judicially imposed on school boards. As more fully explained below, neither the plain language of the statute nor Supreme Court precedent supports imposing an investigation requirement on employers. Furthermore, other policy factors weigh against it. First, the scope of an employer's obligations in conducting "an independent investigation of the allegations against an employee" remains unclear under the Tenth Circuit's decision. Second, conducting either type of investigation is burdensome because every employee belongs to at least two protected classes (race and sex). This means under the Tenth Circuit's rationale, an investigation would be virtually mandatory for every adverse employment decision based on subordinate input.[16] Third, requiring an investigation discounts the

---

[16] When determining how to handle claims of subordinate bias, lower courts have applied the same legal principles to Title VII, ADEA, and ADA cases, meaning whatever holding this Court reaches in this case lower courts will likely apply to cases brought under other employment statutes. *See Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004), (noting Title VII and the ADEA define

other—likely more effective—measures school boards take to eradicate discrimination. Finally, practically speaking, an investigation requirement actually may be unproductive or counterproductive in uncovering subordinate bias.

A. Neither the plain language of Title VII nor prior Supreme Court precedent supports imposing an investigation requirement on employers.

Requiring employers to investigate all adverse employment actions to make sure they comply with Title VII is a dramatic change for employers. This requirement has no grounding in the plain language of Title VII. In fact, the failure to investigate, in and of itself, is not an act of discrimination. *See Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 290 (7th Cir. 1999) (finding the failure to investigate a harassment complaint was not evidence of pretext in a Title VII race discrimination claim where the employee never told his employer that the alleged harassment was race-related); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000) (finding no discrimination on the basis of sex for failing to investigate alleged sexual harassment where none of plaintiffs complaints were actually about sexual harassment).

In other employment contexts, this Court has carefully limited the outer contours of the employer's duty to investigate to a duty to determine whether *a violation of law has occurred* when the employer has some prior reason to suspect possible misconduct. In *Waters v. Churchill*, 511 U.S. 661 (1994), a plurality of this Court in considering the First Amendment free speech claim of a terminated employee determined that an employer is obligated to investigate if the supervisor knows "that there is a substantial likelihood that what was actually said was protected

---

"employer" exactly the same); *Russell v. McKinney*, 235 F.3d 219 (5th Cir. 2000) (ADEA case); *Iduoze v. McDonald's Corp.*, 268 F.Supp.2d 1370 (N.D. Ga. 2003) (ADA case).

[speech]." *Id.* at 677. Similarly, in *Ellerth*, 524 U.S. 742, this Court recognized employers have a duty to respond to specific complaints of harassment. The Court held that in cases not involving a tangible employment action, a defending employer may raise an affirmative defense composed of two parts: (i) proof that it exercised reasonable care to prevent and correct promptly any harassing behavior, and (ii) proof that the employee unreasonably failed to take advantage of "preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765.

In both *Waters* and *Burlington,* the duty to investigate was triggered by some specific allegation that an employee's particular legal rights were at stake. The purpose of the employer's inquiry in both cases was to determine whether a federal law had been violated. The Tenth Circuit's decision departs from this focused approach. Rather than require an investigation only in those instances in which there is a reasonable concern about potential discrimination, it requires the actual decision-maker, in an effort to avoid liability, to conduct an "independent investigation" even if there is no hint of discrimination in the conduct of the subordinate supervisor. This is flawed analysis, because the failure to conduct an "independent investigation" is not, in and of itself, an act of discrimination.

In *BCI*, the Tenth Circuit reasons that absent such a universal investigation requirement, employers "might seek to evade liability, even in the face of rampant race discrimination among subordinates, through willful blindness." 450 F.3d at 486. But the solution to this potential problem is not to cast a wide net and impose vicarious liability on all employers for a subordinate's bias. If the employee being terminated or disciplined has a reason to believe that the subordinate supervisor was biased, then he or she should share this information with the actual decision-maker either informally or through an existing grievance or

appeal process. Employers then should be held accountable if they fail to address on a case-by-case basis those allegations of discrimination brought to their attention.[17]

---

[17] Courts have appropriately limited this accountability inquiry to determining whether the employer engaged in intentional discrimination in failing to investigate the allegations and not in second guessing the employer's reasonable business judgments. "As we have often stated—to a host of deaf ears, it often seems—the court is not a 'super-personnel department' intervening whenever an employee feels he is being treated unjustly." *Cardoso v. Robert Bosch Corp.*, 427 F.3d 429, 435 (7th Cir. 2005). "The aggrieved employee may seek recourse in federal court for discrimination only for the forbidden reasons set forth in Title VII, not for common workplace disputes or poor, nonsensical, or even heavy-handed management techniques or decisions." *Id.* at 436; *see also Riser v. Target Corp.*, 458 F.3d 817, 821 (8th Cir. 2006) (explaining that federal employment laws "have not vested in federal courts authority to sit as super-personnel departments reviewing wisdom or fairness of business judgments made by employers, except to extent that those judgments involve intentional discrimination"), quoting *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995); *Young v. Dillon Co.*, 468 F.3d 1243, 1250 (10th Cir. 2006) (stating that purpose of pretext analysis is "to prevent intentional discriminatory hiring practices," not to enable judges to "act as a 'super personnel department' second guessing employers' honestly held (even if erroneous) business judgments") (citation omitted); *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 626 (6th Cir. 1996) (law "does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with") (citation omitted). Finally, this Court expressed a similar sentiment in *Bishop v. Wood*, 426 U.S. 341, 350 (1976) ("The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.").

B. Requiring a school board to investigate before taking any adverse employment action is burdensome, duplicative of other steps school boards have taken to eliminate discrimination, and may not be productive.

In addition to being unsupported by Title VII, a mandatory investigation requirement before any adverse employment action would be particularly burdensome on school districts. School administrators and other managers will find themselves engaging in defensive employment practices that will increase employer costs, either through the hiring of additional human resources staff and independent investigators or through the adoption and implementation of even more rigorous grievance and appeal policies that consume countless hours of time searching for an inflammatory where there is neither "smoke nor fire."[18]

Under the law in many states, the school board is the actual decision-maker when determining whether to hire or fire employees. In the case of terminating at-will employees, the school board generally will rely entirely on information from subordinates because school boards do not manage or interact with most school employees, except high-level administrators.[19] Under the Tenth Circuit's ruling, the board

---

[18] The nation's employers make thousands of decisions every week; presumably most do not involve discrimination. According to the EEOC, 27,238 charges of racial discrimination were filed nationally in 2006, and 17,324 of these were found to lack reasonable cause. *See* EEOC Enforcement Statistics, http://www.eeoc.gov/stats/race.html.

[19] School districts in collective bargaining states and school district in states where teachers are protected by teacher tenure laws are accustomed to holding hearings for teacher terminations, and of course in this instance investigating the reasons for a termination is easier. However, as *Mateu-Anderegg*, 304 F.3d 618, and *Kramer*, 157 F.3d 620, illustrate, such investigations do not necessarily produce evidence of alleged discriminatory animus.

would be compelled to make an affirmative inquiry in every instance.[20]

School systems also would be subjected to more unworkable burdens because Title VII protects employees against any adverse employment action, not just terminations—including failure to hire or promote. 42 U.S.C. § 2000e-2(a)(2). Even more onerous than a requirement that school boards investigate all recommendations to *terminate*, would be a requirement that boards investigate all recommendations to *hire* a particular individual over all the other applicants. In a typical school district, school administrators solicit applicants, select candidates to interview, conduct interviews, and recommend employment of particular candidates to the board. The board then may meet the recommended candidate and decide whether to hire him or her. If this Court adopts the Tenth Circuit's holding, would a school board have an obligation to investigate the facts surrounding a subordinate's recommendation to hire each employee? If so, what kind of specific inquiry would a board have to make to support a defense that there was no subordinate discrimination? Such an inquiry would, in any case, amount to proving a negative and ultimately would not serve the interests of Title VII in deterring discrimination any more effectively than proactive anti-discrimination policies.

If the school board, as the actual decision-maker, is required to reach behind the facts presented to determine on its own whether or not there are extant indicia of discrimination for every adverse employment action it considers, the board's entire function may be subsumed by

---

[20] In the private sector this may pose less of a problem where a direct supervisor generally has the authority to terminate, hire, or promote an employee based on the supervisor's first hand knowledge of an employee and situation rather than relying on subordinates when making adverse employment decisions.

time-consuming and ultimately unnecessary hearings. The board's ability efficiently to handle even the most routine employment decisions, let alone its other governance functions, would be severely hampered. As part of their governance function, school boards take affirmative steps to ensure that the subordinates recommending the adverse employment action do not act based on racial animus and that supervisors have taken steps necessary to be satisfied that the recommended adverse employment action is justified pursuant to state and federal law and school board policy. These steps include careful screening of administrator candidates, non-discrimination employment policies, employee training, internal complaint procedures, and the accessibility of the school board to receive complaints at school board meetings. If school boards must disregard the recommendations of their administrators and conduct their own investigation, particularly when hiring employees, the untenable result will be to shift the administrative personnel role to the school board itself. [21]

The Tenth Circuit's theory that "simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory," *BCI*, 450 F.3d at 488, is unrealistic in practice. Indeed, it was completely unavailing in *Kramer*, where the teacher was given a chance to give her version of events during a five-hour school board hearing. Similarly, other types of investigations might reveal disparities between a supervisor's and an employee's version of the events leading up to a termination, but they would not necessarily uncover the supervisor's racial bias, thus leaving the actual decision-maker to assess credibility, but no more able to identify and short circuit any improper motives the supervisor might harbor. If investigating an employee's side of the story

[21] In jurisdictions where state law pointedly delineates school board and administrator roles, a ruling to this end would have a deleterious effect on statutorily established roles.

generally fails to reveal racial animus, there is no practical justification for deeming this a requirement under Title VII.

C. Requiring a school board to investigate possible discriminatory animus whenever a subordinate has recommended an adverse employment action discourages employees from fulfilling their duty to minimize the harm of discrimination.

Where the employer has already established preventive and corrective measures, such as complaint, grievance, and training procedures aimed at exposing and deterring improper discrimination, the Tenth Circuit's investigation requirement negates any responsibility on the part of employees to avail themselves of the employer's "preventive and remedial apparatus." This Court has held that employers who "have provided a proven, effective mechanism for reporting and resolving complaints of [discrimination], available to the employee without undue risk or expense. . ." should not be held liable where the plaintiff unreasonably fails to use the preventive opportunities made available by the employer. *Faragher*, 524 U.S. at 806. In so ruling, this Court recognized that avoiding the harm that Title VII seeks to prevent is a joint responsibility of employers and employees. This Court should reaffirm this principle and reject a rule that would place an inordinate burden on employers by requiring them to presume and search for discriminatory animus even where there is absolutely no indication that any exists.

As explained in Part II.B., *supra*, such a rule would be particularly burdensome for school boards that almost always rely on subordinates for information before taking tangible employment action. Screening every employment action for discriminatory (not just racial) bias[22] would likely

---

[22] *See, supra*, n.16.

require innumerable hearings with inquiries of all informing subordinates about their biases before making any decision. Even where state law, collective bargaining agreements, or constitutional provisions already require a hearing before an employee is terminated, the focus of the hearings would shift from determining whether just cause for the termination exists and whether the employee received any remedial opportunities to which he or she may have been entitled to searching for the potential, if not evanescent, discriminatory animus of any other employee informing the board's decision. The employer's burden in chasing this fleeting dragon in the sky would be inordinate, unreasonable, and unnecessary.

While the law requires actual decision-makers to reasonably investigate[23] and respond to employee complaints

---

[23] This Court recognized in *Waters* that an employer's investigation could be deemed reasonable even if others might disagree with it. "Of course, there will often be situations in which reasonable employers would disagree. . .[over] how much investigation needs to be done, . . . "[o]nly procedures outside the range of what a reasonable manager would use may be condemned as unreasonable." 511 U.S. at 678. Lower courts have been sympathetic of the imperfections inherent in any investigation. For example, the Seventh Circuit recently rejected a claim by a plaintiff who had been fired following a "shoddy" investigation of a sexual harassment complaint. *See Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 418 (7th Cir. 2006) (stating that question in discrimination case is not "whether the employer was mistaken, cruel, unethical, out of his head"). In fact, case law illustrates that employer mistakes, by themselves, ordinarily will be insufficient to raise a question of fact on the questions of discrimination or pretext. *See, e.g., Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253 n. 5 (11th Cir. 2001) (stating that pretext means "more than a mistake on the part of the employer") (citation omitted); *Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 403 (5th Cir. 2001) (stating that school's "mistaken understanding" regarding operation of certain employment procedures would not raise issue of fact); *Scales v. Slater*, 181 F.3d 703, 711 (5th Cir. 1999) (holding that employer's failure to follow own procedures will not defeat summary judgment unless there is evidence that departures were meant to be discriminatory).

of discrimination, a requirement that employers conduct such an inquiry in the absence of any report of bias would be unproductive or even counterproductive. An actual decision-maker would in most cases be engaging in time consuming and labor intensive inquests to determine a negative, and would remain uncertain that the investigation was thorough enough to satisfy a court. In the absence of any indication at the outset of discriminatory animus, it is difficult to imagine how Title VII's deterrent purposes are served by requiring the school board to engage in such a far flung inquiry before making every employment decision.

Investigating for discriminatory bias in every employment decision may even be counter-productive, because it may discourage employees from becoming whistleblowers, knowing that reporting another employee's behavior will result in an inquiry into their own potential discriminatory motives for disclosing information that may play a factor in an employment decision. Such reticence can have disastrous consequences in a school setting where school administrators may discover employee misconduct, such as inappropriate sexual relationships between employees and students, through other employees reporting their suspicions. *See, e.g., P.H. v. School Dist. of Kansas City,* 265 F.3d 653 (8th Cir. 2001) (other teachers complained to administration that teacher was spending too much time with student, student was frequently tardy and absent from class, and student's grades were suffering); *Doe v. School Admin. Dist. No. 19*, 66 F.Supp.2d 57 (D. Me. 1999) (substitute teacher reported to administration that she saw male teacher dance in sexually suggestive manner with several boys and had heard rumors that teacher had a sexual relationship with student); *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001) (school librarian reported to principal that she saw student sitting on teacher's lap in inappropriate manner).

Finally, investigating for racial animus in all instances, especially where the actual decision-maker has no

reason to believe it exists, may only serve to encourage employees on the brink of termination to manufacture claims of racial bias to avoid termination. A number of the "cat's-paw" cases decided by the lower courts were brought based on surprisingly little evidence of discrimination. *See, e.g., Rose v. New York City Bd. of Educ.*, 257 F.3d 156 (2d Cir. 2001) (age discrimination claim based on supervisor allegedly telling plaintiff twice she could be replaced by someone "younger" and "cheaper"); *Schreiner v. Caterpillar, Inc.*, 250 F.3d 1096 (7th Cir. 2001) (sex discrimination case based on supervisor's statement in an investigation that the female plaintiff's position as "not a woman's area," where the supervisor immediately approved both of plaintiff's requests for a pay increase upon being informed of them). At the very least, such cases illustrate that it would take little effort for a disgruntled employee to misconstrue something innocuous a supervisor said or simply manufacture a discriminatory statement made by a supervisor in an attempt to avoid termination.

CONCLUSION

The vast majority of school districts have anti-discrimination policies and complaint procedures through which employees can report discrimination. Once notified, school districts are obligated to investigate these reports and to take appropriate remedial action where the investigation reveals discrimination has in fact occurred. While these corrective procedures may not perfectly eliminate all discrimination, there is no reason to believe that requiring employers to engage in an extensive investigation each time a subordinate recommends a tangible employment action to the actual decision-maker will be more effective than these measures in advancing Title VII's purposes. For these reasons this Court should avoid a rule that would hold employers, like school districts, that have already taken

reasonable steps to meet their Title VII obligations by adopting, disseminating, and implementing non-discrimination policies that include effective mechanisms for reporting and redressing discrimination complaints, liable for relying on information from subordinates who harbor discriminatory animus unknown to the actual decision-maker.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Francisco M. Negron, Jr. *
General Counsel
Lisa E. Soronen
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
703-838-6722 **Counsel of Record*

No. 06-341

IN THE

Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AS *AMICUS CURIAE* OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

MICHAEL P. AITKEN
KENYA N. WILEY
SOCIETY FOR HUMAN RESOURCE MANAGEMENT
1800 DUKE STREET
ALEXANDRIA, VIRGINIA 22314
(703) 535-5026

MANESH K. RATH
Counsel of Record
ROBERT A. SHEFFIELD
PETER L. DE LA CRUZ
MELISSA A. D'AMBROSE
KELLER AND HECKMAN LLP
1001 G ST., NW, STE. 500 W
WASHINGTON, D.C. 20001
(202) 434-4182

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Under what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, where the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES vii

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. DISPARATE TREATMENT CASES REQUIRE A SHOWING THAT AN EMPLOYER INTENDED TO DISCRIMINATE 7

A. Title VII Disparate Treatment Claims Require Intent Whereas A Plaintiff May Disregard Intent in Disparate Impact Claims 10

B. Title VII Defines An Employer To Include An Agent Of The Employer. The Agent In Subordinate Supervisor Cases Is The Formal Decisionmaker, Not The Subordinate Supervisor. 11

C. Plaintiffs Must Show Discriminatory Motive By The Person Committing The Adverse Action. A Plaintiff May Not Make A Disparate Treatment Case By Grafting One Person's Discriminatory Motive To Another Person's Adverse Action 12

D. Because A Plaintiff Must Show That A Person Or Persons Took an Adverse Action With Discriminatory Motive, The Court's Inquiry Should Center Upon The Independence Of The Formal Decisionmaker, Not Upon Whether An Allegedly Biased Person *Caused* Another To Take An Adverse Action 13

E. If We Look to Whether The Formal Decisionmaker Took Adverse Action *Independently* Of The Person Who Harbored Discriminatory Motive, The Various Circuits' Results Would Appear Logical And Consistent 16

II. DIFFERENT FACTUAL SITUATIONS REQUIRE A MORE FLEXIBLE APPROACH TO DETERMINING THE INDEPENDENCE OF THE FORMAL DECISIONMAKER 17

A. The Formal Decisionmaker May Demonstrate Its Independence By Conducting An Inquiry 20

B. The Tenth Circuit Overlooks Numerous Other Ways In Which Independence May Be Demonstrated 23

1. Termination By The Formal Decisionmaker Pursuant to a Policy of Automatic Termination (e.g., a Zero-Tolerance Policy) 24

2. The Supervisor Does Not Advocate For a Particular Decision But Merely Reports Facts To or Seeks Advice From the Formal Decisionmaker 26

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Bender v. Hecht's Dep't Stores,
455 F.3d 612 (6th Cir. 2006) 21

Branson v. Price River Coal Co.,
853 F.2d 768 (10th Cir. 1988) 20

Burks v. Lasker, 441 U.S. 471 (1979) 21

Burlington N. & Santa Fe Ry. Co. v. White,
126 S. Ct. 2405 (2006) 8, 10

EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles,
450 F.3d 476 (10th Cir. 2004) ..... *passim*

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 10

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 8

Hill v. Lockheed Martin Logistics Mgmt., Inc.,
354 F.3d 277 (4th Cir. 2004) ..... *passim*

Kamen v. Kemper Fin. Servs., Inc.,
500 U.S. 90 (1991) 21

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 8, 15, 17

Millbrook v. IBP, Inc., 280 F.3d 1169 (7th Cir. 2002) 21

NLRB v. Bildisco and Bildisco, 465 U.S. 513 (1984) 21

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999) 7

Pers. Adm'r of Massachusetts v. Feeney,
442 U.S. 256 (1979) 8, 9

Pippin v. Burlington Res. Oil and Gas Co.,
440 F.3d 1186 (10th Cir. 1988) 20

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 8, 14, 18

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133 (2000) ..... *passim*

Russell v. McKinney Hosp. Venture,
235 F.3d 219 (5th Cir. 2000)..... *passim*

Shager v. Upjohn Co.,
913 F.2d 398 (7th Cir. 1990) ..... *passim*

Smith v. City of Jackson, Mississippi,
544 U.S. 228 (2005) 7

Stallings v. Hussman Corp.,
447 F.3d 1041 (8th Cir. 2006).....21

Texas Dept. of Cmty. Affairs v. Burdine,
450 U.S. 248 (1981) 8

Statutes

Title VII of the Civil Rights Act of 1964,
42 U.S.C. §§ 2000e *et. seq.* ..... *passim*

42 U.S.C. § 2000e(b).....11

42 U.S.C. § 2000e-2 14

Other Authorities

Restatement (Third) of Agency § 1.01 11

Restatement (Third) of Agency § 2.01 11

Restatement (Third) of Agency § 3.05 11

INTEREST OF THE *AMICUS CURIAE*

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management.[1] Representing more than 210,000 individual members, SHRM's mission is to serve the needs of human resource professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that human resources is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries.

If the decision below, as well decisions in other circuits on the same issue, were left undisturbed, SHRM's members in the human resource profession would face a two-fold dilemma. First, the lower court's opinion would require an independent investigation when none may be needed. Second, the Tenth Circuit's requirement that an investigation be "adequate" does not furnish human resource professionals with a clear statement of their minimum legal requirement.

SHRM's members seek a principled standard that is rooted in Title VII's statutory prohibition against an employer taking an adverse action against an employee with discriminatory intent. SHRM's members have an interest in a standard that preserves the human resource professional's ability to determine whether and what kind of investigation is necessary. Finally, SHRM's members have an interest in a

---

[1] Pursuant to Rule 37.6, *amicus* states that this brief was authored in whole by counsel for the Society For Human Resource Management. This brief was not authored in any part by counsel for a party to this matter. No person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the Clerk.

judicial standard that provides clear guidance to the human resource manager when conducting an investigation that does not leave open the possibility that a court will second guess the adequacy of the investigation.

There are three elements of the Tenth Circuit's opinion that are pertinent to SHRM and its members. First, the Tenth Circuit held that "a plaintiff must demonstrate that the actions of the biased subordinate caused the employment action." *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 488 (10th Cir. 2004). Second, the Tenth Circuit held that that "an employer can avoid liability by conducting an independent investigation of the allegations against an employee." *Id.* at 488. Third, the Tenth Circuit rejected BCI's investigation as "inadequate, as a matter of law" for breaking the causal link between Mr. Grado's alleged bias and Mr. Peters' termination. *Id.* at 492. The Tenth Circuit held that BCI Coca-Cola's investigation was inadequate because Ms. Edgar never sought any other version of events. *Id.* at 493. The Tenth Circuit reasoned that "asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory." *Id.* at 488.

STATEMENT OF THE CASE

The United States Equal Employment Opportunity Commission (EEOC) filed a claim on behalf of Stephen Peters, an employee at the BCI Coca-Cola Bottling Company of Los Angeles. Mr. Peters was the most senior merchandiser at BCI Coca-Cola's Albuquerque, New Mexico, facility, and he enjoyed the best shifts, which included Saturdays and Sundays off. *Id.* at 478.

On Friday, September 28, Mr. Peters' supervisor, Cesar Grado, instructed Mr. Peters to report to work on Sunday, September 30, 2001. *Id.* at 479. Mr. Peters refused. *Id.* Because the human resource professional for the Albuquerque facility, Sherry Pederson, was not at work that day, Mr.

Grado sought advice from Pat Edgar, the human resource professional in BCI Coca-Cola's Phoenix, Arizona, facility. *Id.* Upon Ms. Edgar's instruction, Mr. Grado informed Mr. Peters that he needed to work on Sunday and that his refusal would be insubordination that "could lead to termination." *Id.* Mr. Peters "started yelling," and his final response to Mr. Grado was, "[D]o what [you] got to do and I'll do what I got to do." *Id.* (alteration in original).

Mr. Grado again contacted Ms. Edgar and informed her that he had asked Mr. Peters to describe his weekend plans, and that Mr. Peters had refused, saying they were "none of [Mr. Grado's] business." *Id.* at 480. Mr. Grado also recounted Mr. Peters' final remarks ("Do what you got to do"), which Ms. Edgar determined to be insubordination. *Id.* Ms. Edgar, however, did not make the decision to terminate Mr. Peters at that time. *Id.*

Mr. Peters did not report to work on Sunday. Instead, he went to a walk-in urgent care clinic on Saturday evening with complaints of a headache, sinus pain, and a cough. *Id.* "A doctor diagnosed him with a sinus infection, gave him a prescription, and directed him not to return to work until Monday, October 1." *Id.*

On Monday morning, October 1, Ms. Edgar held telephone conferences with Ms. Pederson and Mr. Grado to discuss Mr. Peters' conduct the previous Friday. *Id.* During those conferences, Mr. Grado informed Ms. Edgar that Mr. Peters did not appear for work on Sunday. Additionally, Ms. Pederson reviewed Mr. Peters' personnel file and found a Disciplinary Status Notice for an event in 1999 that resulted in Mr. Peters receiving a two day suspension and "final warning" for insubordination. *Id.* (The facts of the 1999 incident were strikingly similar to the instant case. *Id.* In the 1999 event, Mr. Peters was asked on a Friday to work on his weekend day off, and his response was a "rude and unprofessional" refusal. *Id.* at 480.)

By the end of Monday, October 1, Ms. Edgar made her final decision to terminate Mr. Peters for insubordination. *Id.* It is undisputed that Ms. Edgar did not know Mr. Peters' race, and no party suggests that either Ms. Edgar or Ms. Pederson harbored racial animus against Mr. Peters. *Id.* at 481.

On October 11, Mr. Peters filed an EEOC complaint of race discrimination, and on December 30, 2002, the EEOC filed suit on his behalf in the United States District Court for the District of New Mexico. *Id.* at 482. The EEOC based its case on the theory that Mr. Grado harbored discriminatory animus towards African Americans and that his animus should be imputed to BCI Coca-Cola because Mr. Grado had "substantial involvement" in Mr. Peters' firing. *Id.* at 482. The district court granted BCI Coca-Cola's motion for summary judgment on the ground that Mr. Grado's involvement in Mr. Peters' firing was too remote to permit any bias he may have held to be imputed to BCI Coca-Cola. *Id.* at 483.

The EEOC appealed to the Tenth Circuit, which reversed the district court's judgment. The Tenth Circuit held that the employer should be liable if the biased subordinate supervisor *caused* the employer to terminate an employee. *Id.* at 488. Implicitly, the Tenth Circuit also held that the employer may break that causal connection by conducting an "adequate investigation," which must at least contain an interview of the employee to elicit his side of the story. *Id.* at 491-92. There is also language in the Tenth Circuit's opinion that suggests an "adequate investigation" must also contain a thorough review of the employee's personnel file. *Id.* at 492.

SUMMARY OF ARGUMENT

Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et. seq.*, the disparate treatment standard prohibits adverse action with the intent or motive to discriminate. The words "intent" and "motive" are used interchangeably in Title VII jurisprudence. In creating a disparate treatment claim, Congress' did not enact a statute of strict

liability and did not prohibit or seek to penalize conduct void of discriminatory intent. However, under the Tenth Circuit's holding in this case (as well as holdings from the Seventh Circuit and other Circuit Courts of Appeal) makes an employer liable for the concededly unknown biased motive of a subordinate. In so holding, the Tenth Circuit improperly relieves the plaintiff of his burden of showing that a decisionmaker took an adverse employment action with the statutorily required discriminatory motive.

SHRM recognizes the value of a taking a considered approach to termination. SHRM agrees with the Tenth Circuit that there are instances in which asking an employee his side of a story would illuminate a human resource professional's decisionmaking. However, SHRM does not agree with the Tenth Circuit that an employer could be liable under Title VII based upon the actions of a human resource professional simply because a subordinate supervisor harbored a discriminatory motive unknown to the human resource professional. This would deprive an employer of well-established defenses such as the presence of a legitimate nondiscriminatory reason for an adverse action, a business necessity, or the uniform application of a neutral policy.

There is an abundance of authority that limits disparate treatment liability under Title VII to an adverse action born of discriminatory motive. Thus, whether a supervisor "caused" the employer to terminate an employee is irrelevant to a disparate treatment case under Title VII. Further, a causation analysis sweeps too broadly because, arguably, most or all adverse actions can trace their causal roots, directly or indirectly, to a supervisor's initiative.

In disparate treatment cases, SHRM proposes that a more precise inquiry focuses upon the decisionmaker's motives and upon whether the decisionmaker acted independently of a biased subordinate.

SHRM understands the subtlety and complexity of assessing liability in instances when a supervisor is involved in an adverse action. The test adopted should focus upon whether the neutral human resource manager's decision was *independent* of the supervisor's biased report.

As a converse of the proposition that the formal decisionmaker was independent of the supervisor, the judicial inquiry should ask whether the supervisor's report and the strength of his advocacy for termination rose to such a level that the human resource manager acted interdependently with the supervisor such that they collectively performed the decisionmaking function. SHRM asserts this was the case in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), discussed below.

In the instant case, the Tenth Circuit requires an "adequate investigation" to break a causal connection between the supervisor and decisionmaker. While an investigation is certainly one way to demonstrate that the human resource professional's decision was independent of the supervisor's bias, the Tenth Circuit extends this proposition too far for two reasons.

First, Title VII cases have consistently held that a court will not second guess the adequacy of an employer's conduct, because courts have consistently refused to serve as an employer's "super-personnel" department. Hence, the Tenth Circuit erred in concluding that, although Ms. Edgar conducted an investigation, it was inadequate as a matter of law.

Second, a human resource professional does not have to conduct an investigation in all circumstances to establish that she acted independently of a supervisor. For example, an investigation is not necessary when an employee's terminable offense is open, apparent, and obvious. Similarly, no investigation is needed when a company has an automatic termination policy, such as a zero-tolerance policy for guns or drugs, a three-strikes policy, or a uniformly applied no-fault

absence policy. In the instant case, Mr. Peters' 1999 "final warning" constituted the basis for automatic termination under the employer's uniform policies.

Similarly, when a human resource manager monitored and counseled a situation as it unfolded, no further investigation may have been needed at the situation's critical moment. This was the circumstance the instant case.

In addition, SHRM notes that the Tenth Circuit's decision does not reflect the realities of workplaces, particularly those of larger employers. A trend amongst many employers is to decentralize the human resource functions in a variety of ways. At other workplaces, human resource departments are opting to train responsible senior staff in traditional human resource functions, such as performance appraisals and investigations. The Tenth Circuit decision fails to provide employers with the flexibility structure a corporate architecture that serves an employer's unique challenges.

ARGUMENT

I. DISPARATE TREATMENT CASES REQUIRE A SHOWING THAT AN EMPLOYER INTENDED TO DISCRIMINATE.

Under Title VII, an employee may bring either a claim of disparate impact or of disparate treatment against an employer. *E.g., Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 617 n.2 (1999) (Thomas, J., dissenting) ("This Court has recognized that two forms of discrimination are prohibited under Title VII: disparate treatment and disparate impact."). *See also Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005) (Where plaintiff brought both a disparate treatment claim and a disparate impact claim). The instant case involves a claim of disparate treatment, as do all of the cases in the federal circuit courts that involve the issue of subordinate supervisory bias.

For a plaintiff to survive summary judgment in a disparate treatment claim, he must show that the decisionmaker, not just any employee, took adverse action with discriminatory intent. *E.g.*, *Reeves*, 530 U.S. at 143; *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). In *Reeves*, this Court held that the ultimate question is whether the employer intentionally discriminated. 530 U.S. at 146. In *Reeves*, the first step in this Court's analysis was to determine the motives of the various formal decisionmakers. This Court noted that there were no allegations that two of the formal decisionmakers in *Reeves* were motivated by age. 530 U.S. at 140. Thus this Court's focus was upon the motives of the formal decisionmaker and upon who should be deemed an actual decisionmaker, and not upon the motives of just any employee.

The element of motive or intent is integral to a disparate treatment claim under Title VII. *See Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2408 (2006) ("Congress amended Title VII in 1991 to permit victims of intentional discrimination to recover compensatory . . . and punitive damages"); *Reeves*, 530 U.S. at 143; *Burdine*, 450 U.S. at 256; *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 278-79 (1979); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989). In *Reeves*, this Court held that "'liability depends on whether the protected trait . . . actually motivated the employer's decision.'" 530 U.S. at 141 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court held that the plaintiff could show that McDonnell's proffered reason for refusal to rehire was merely pretext by showing that McDonnell Douglas exhibited racial discrimination during Mr. Green's previous employment, or by showing that McDonnell Douglas rehired whites with a similar criminal background. Mr. Green was arrested and convicted for illegally blocking traffic at the entrance of McDonnell Douglas' worksite. He then applied for

reemployment. Thus, the burden remains with the plaintiff to show that the person taking an adverse action took a protected status into consideration. *See Reeves*, 530 U.S. at 143 (holding that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.") (alteration in original) (internal quotations omitted).

This Court has held that to show intentional discrimination, a plaintiff must show that the "decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,'" the protected characteristic. *Feeney*, 442 U.S. at 279 (1979). In *Feeney*, in evaluating a discrimination claim under 42 U.S.C. § 1983, this Court explained that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.*

SHRM argues that the courts that have adopted a "cat's paw" style of causation analysis detoured from Title VII jurisprudence because they allow a plaintiff to establish disparate treatment without requiring the plaintiff to show that the decisionmaker made his decision "because of," with intent regarding, or with motive regarding, the plaintiff's protected status.

Instead, these courts allow the plaintiff to graft the discriminatory motive of one person onto the adverse action of a neutral other. This erroneous detour, starting with the Seventh Circuit in *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), has been followed to some extent by the Fifth Circuit in *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000), and the Tenth Circuit in the instant case. However, the approach taken by these courts cannot be reconciled with either Title VII's intent requirement or this Court's recent decision in *Reeves*.

A. Title VII Disparate Treatment Claims Require Intent Whereas A Plaintiff May Disregard Intent In Disparate Impact Claims

In *Shager*, the Seventh Circuit stated that "[t]he common law rule is that an employer is liable for intentional torts of its employees committed in furtherance of their employment." 913 F.3d at 404. SHRM disagrees with this broad statement of law which forms the basis for the Seventh Circuit's "cat's paw" causation analysis. Although an employer usually will be liable for an employee's negligence tort committed within the scope of employment, an employee's intentional tort is not necessarily imputed to the employer because, by definition, the act may be outside the scope of employment. Congress expressly required an analysis focused on intent for Title VII disparate treatment claims. The Seventh Circuit's opinion in *Shager* began the detour into causation analysis, and it erred in imposing a causation analysis in disparate treatment claims.

Title VII's prohibition against disparate treatment is based on a discriminatory motive or intent by the person or individuals taking an adverse action. This is the essence of a disparate treatment claim. *E.g.*, *Burlington Northern*, 126 S. Ct. 2405 at 2417 ("Congress amended Title VII in 1991 to permit victims of intentional discrimination to recover compensatory . . . and punitive damages").

In contrast to disparate treatment claims, which are arguably claims under a statutory intentional tort, disparate impact claims arguably arise from a statute of strict liability since the question of violation centers upon the result and disregards intent. Thus, disparate impact claims recognize that an employer may violate Title VII even without intending to discriminate. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Causation does not appear to be an element of intentional torts, although it is relevant in negligence, and in fact would short circuit the plaintiff's burden to prove intent.

In the instant case, the Tenth Circuit adopted the Seventh Circuit's causation approach and held that BCI Coca-Cola could be liable—despite Ms. Edgar's lack of discriminatory intent—if Mr. Grado's alleged bias caused Mr. Peters' termination. To subject BCI Coca-Cola to liability under Title VII when all parties concede that the decisionmaker lacked intent to discriminate would be to treat all disparate treatment claims as disparate impact claims; that is, essentially as claims of strict liability. However, as discussed above, Title VII does not permit a court to ignore the decisionmaker's intent in disparate treatment cases.

B. Title VII Defines An Employer To Include An Agent Of The Employer. The "Agent" In Subordinate Supervisor Cases Is The Formal Decisionmaker, Not The Subordinate Supervisor

Title VII defines an "employer" as a person engaged in an industry affecting commerce and any agent of that person. 42 U.S.C. § 2000e(b). An agency relationship exists when a principal assents to another acting on the principal's behalf. Restatement (Third) of Agency § 1.01 (2006). An agent acts with actual authority when the agent "reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." *Id.* at § 2.01. In addition to action, agency is defined by authority to act. *Id.* at §§ 2.01, 3.05.. Any person may ordinarily be empowered to act as an agent so as to affect the legal relations of another. *Id.* at § 3.05.

In the case at hand, Mr. Grado was not the agent of BCI Coca-Cola for purposes of Title VII because he did not take the adverse action against Mr. Peters. Also, BCI Coca-Cola did not give Mr. Grado authority to discipline or terminate his subordinates. It therefore did not assent to have Mr. Grado act on its behalf. The one who took the adverse action was Mr. Edgars, the human resource professional. She was the agent of BCI Coca-Cola since she had actual authority to terminate employees on behalf of BCI Coca-Cola.

In the leading subordinate bias, or "cat's paw," cases, including the instant case, it is not in dispute that the allegedly biased supervisor did not have authority to take adverse employment on behalf of the employer. *BCI Coca-Cola*, 450 F.3d at 479; *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 282 (4th Cir. 2004); *McKinney*, 235 F.3d at 224; *Shager*, 913 F.2d at 405. Thus, the Seventh Circuit and others err when they look to Title VII's language defining an employer as "any agent" of the employer and conclude that the subordinate supervisor could be that agent despite his undisputed lack of authority to discipline or terminate.

C. Plaintiffs Must Show Discriminatory Motive By The Person Committing The Adverse Action. A Plaintiff May Not Make A Disparate Treatment Case By Grafting One Person's Discriminatory Motive To Another Person's Adverse Action

Since a plaintiff is required to show that the actual decisionmaker had motive to discriminate, the "cat's paw" cases would be easy to dispense with simply by showing that the formal decisionmaker was neutral. In all of these cases, the parties do not dispute the formal decisionmaker's lack of bias. These cases are not easy to resolve, however, because the formal decisionmaker's level of interdependence with other persons in arriving at a decision varies from case to case.

A disciplined application of recognized disparate treatment law would not permit a plaintiff to prevail by showing that bias resided in one person, and an adverse action was taken by another person, and thus, combined, they violated Title VII.

D. Because A Plaintiff Must Show That A Person Or Persons Took An Adverse Action With Discriminatory Motive, The Court's Inquiry Should Center Upon The Independence Of The Formal Decisionmaker, And Not Upon Whether An Allegedly Biased Person *Caused* Another To Take An Adverse Action

The legal standard used must look to the intent of the decisionmaker. The Tenth Circuit's standard, however, focuses on the person with bias. The legal standard and the person a test focuses upon must match. In other words, the test must arise from the standard. The proper test is one that focuses on the intent of the decisionmaker, not on the bias of the subordinate,

In *Shager* and *McKinney*, the courts' inquiries focused upon the supervisor and whether his report of an employee's conduct caused or influenced the neutral decisionmaker's decision. *Shager*, 913 F.3d at 405; *McKinney*, 235 F.3d at 226. Their inquiry incorrectly focuses upon the impact created by the biased supervisor.

Since Title VII only prohibits conduct by the employer and its agent, the neutral decisionmaker, the inquiry should focus upon the neutral decisionmaker. A test better rooted in Title VII's requirement of discriminatory intent would evaluate who is or are the decision makers, and whether the decisionmaker arrived at her decision independently of the biased supervisor.

If the decisionmaker's decision was not independent, but rather was so dependent upon the supervisor, that the supervisor and the formal decisionmaker acted interdependently, then the court may conclude that the supervisor is one of a collaborative of decisionmakers.

First, the causation analysis adopted by the Seventh and Tenth Circuits assumes as a premise that a court is permitted in the first instance to graft one person's bias onto an admit-

tedly non-biased person. This premise has no roots in Title VII jurisprudence. Title VII prohibits an adverse action because of an individual's protected status. 42 U.S.C. § 2000e-2. This Court has construed the words "because of" to mean that protected status must be irrelevant to the employment decision. *Price Waterhouse*, 490 U.S. at 240. In *Price Waterhouse*, the Court held that to construe "because of" to mean "but-for causation" "is to misunderstand" the statutory language. *Id.* A but-for causation analysis, the Court held, incorrectly asks whether an employer would have terminated if the protected status was not present. *Id.* According to the Court, the critical inquiry is "the one commanded by the words of" Title VII—whether protected status "was a factor in the employment decision *at the moment it was made*." *Id.* at 241.

Cautioning that we "need not leave our common sense at the doorstep when we interpret a statute," the Court reasoned that in drafting the words "because of," Congress did not require a plaintiff to identify a precise causal role played by discriminatory motives. *Id.* at 241. Rather, the court concluded that Congress intended to require a plaintiff to prove that the employer "relied upon sex-based considerations in coming to its decision." *Id.* at 241-42. Congress did not intend to allow a plaintiff to take a short cut in his burden by attributing a supervisor's bias to an employer merely because the supervisor was a but-for cause of a particular result. Instead, Congress intended a more rigorous burden to show improper considerations were a factor in the decision.

Second, the use of causation analysis is overbroad as an analytical tool since a termination decision almost always is prompted by a supervisory report to a neutral decisionmaker. The supervisor sets in motion a series of events that directly or indirectly lead to termination and thus, to a greater or lesser extent always has some causative effect upon the termination. This approach does not inform the court as to whether the employer disparately treated an employee.

A more precise analytical test would be one rooted in Title VII's requirement that a plaintiff must show that a decisionmaker took adverse action with discriminatory motive.

The question that arises when a neutral decisionmaker decides to terminate an employee on the basis of a supervisor's report is not whether the supervisor caused the decision, but rather whether the supervisor's role in the termination rises to such a level of involvement that the supervisor was one of the collective decisionmakers. This is a clear holding of *Reeves*, and it seems to be implicit in the Fifth Circuit's holding in *McKinney*.

As part of the *McDonnell Douglas* burden-shifting paradigm, an employer may present evidence that the decisionmaker was not biased. *Reeves*, 530 U.S. at 142. This point rests on a debatable presumption that the formal decisionmaker is the only decisionmaker. The plaintiff may attempt to show that the employer's proffered reasons are merely pretextual by showing that the formal decisionmaker did not act alone. The plaintiff may establish that the supervisor was so involved in the process leading to the decision that the supervisor's biased conduct, together with the formal decisionmaker's adverse action, were interdependent and that the supervisor and the formal decisionmaker collectively terminated the employee. This manner of framing the issue focuses the analysis upon the level of interdependence between the biased supervisor and the formal decision maker rather than upon causation.

If the facts present at the summary judgment stage are such that there can be no genuine dispute that the formal decisionmaker acted independently of the supervisor's report, then the court should decide, as a matter of law, that the bias of the supervisor may not be attributed to the employer.

There are a number of types of factual situations in any case that, if not in genuine dispute, should permit a court to determine as a matter of law that the decisionmaker acted

independent of the supervisor's report. We examine those types of factual situations in Section II below.

E. If We Look to Whether The Formal Decisionmaker Took Adverse Action *Independently* Of The Person Who Harbored Discriminatory Motive, The Various Circuits' Results Would Appear Logical And Consistent

A comparison of the very different factual circumstances in *Shager*, *McKinney*, *Reeves*, and *Lockheed Martin* illuminates the circuit courts' different approaches to subordinate supervisor bias.

The courts have refused to dismiss a plaintiff's discrimination claim when a supervisor engaged in an ongoing dialogue with a formal decisionmaker in an effort to recommend and, in some cases, to strongly advocate or pressure, the formal decisionmaker to terminate the employee. *Reeves*, 530 U.S. at 138; *McKinney*, 235 F.3d at 224; *Shager*, 913 F.2d at 400. In contrast, in cases in which a supervisor merely reported an incident or sought guidance from the human resource department, the courts have granted summary judgment to the employer. *Lockheed Martin*, 354 F.3d at 282. We note that in the instant case, Mr. Grado did not recommend termination, but merely sought guidance from and reported facts to Ms. Edgars. *BCI Coca-Cola*, 450 F.3d at 479.

In cases where the decision to terminate was based upon objective grounds such as safety, absence, insubordination, or where the employee had not contested the basis for termination, the courts have granted summary judgment to the employer. In *Lockheed Martin*, for example, the termination grounds of safety violations and tool management were objective and Ms. Hill did not dispute them. 354 F.3d at 282-83.

In contrast, when the purported ground for termination was subjective, such as a performance evaluation, or where the plaintiff disputed the termination basis, the courts have

denied judgment as a matter of law for the employer. *Shager*, 913 F.2d at 406; *McKinney*, 235 F.3d at 230. In this case, Mr. Peters did not dispute that he refused to work on Sunday or that he said, "do what you got to do."

When an employer conducted any degree of inquiry, the courts have tended to dismiss the case at summary judgment. In *Lockheed Martin*, the employer reviewed the disciplinary reports and the personnel file. 354 F.3d at 282. By contrast, where the supervisor so strongly advocated for termination that the decisionmaker accepted the supervisor's judgment without inquiry, the courts have allowed the plaintiff to proceed to trial. In *McKinney*, the supervisor, who was related to the owner, threatened to quit if the plaintiff was not terminated. 235 F.3d at 224. In *Reeves*, this Court found that the supervisor, Mr. Chesnut, wielded absolute authority and strongly lobbied for the plaintiff's termination to the owner, his wife. 530 U.S. at 152. In the instant case, there was no dispute that Ms. Edgar did conduct some inquiry. *BCI Coca-Cola*, 450 F.3d at 492.

Thus, the elements of a standard announce themselves by an examination of the facts at summary judgment in the cases at issue. Such a standard must be consistent with the Title VII jurisprudence described above, which requires the person who takes an adverse action must be the one who harbors the discriminatory motive.

II. DIFFERENT FACTUAL SITUATIONS REQUIRE A MORE FLEXIBLE APPROACH TO DETERMINING THE INDEPENDENCE OF THE FORMAL DECISIONMAKER

There are three common factual scenarios that drive litigation under the discrimination laws. In the first class of cases, the formal decisionmaker harbors the animus, and the plaintiff alleges that his decision was motivated by that animus. *See, e.g., McDonnell Douglas*, 411 U.S. 792 (1973). In these cases, the formal decisionmaker's animus is rightly im-

puted to the employer because the formal decisionmaker is the employer's agent.

In the second class of cases, the biased individual has no supervisory or disciplinary authority over the employee against whom adverse action is taken. Expressions of animus by these individuals are mere "stray remarks," and they may not be imputed to the employer. In *Price Waterhouse*, 490 U.S. at 277, this Court stated that stray remarks, "cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard."

Although the Fourth Circuit did not characterize it as such, the facts of *Lockheed Martin* fall within the "stray remarks" doctrine. In that case it was undisputed that the allegedly biased safety inspector who reported Ms. Hill's violations of company policy had no supervisory or disciplinary authority over Ms. Hill. *Lockheed Martin*, 354 F.3d at 282. Rather, the safety inspector merely reported violations to Ms. Hill's supervisor, who possessed disciplinary—but not termination—authority. *Id.* It was also undisputed that none of Hill's four direct supervisors harbored any age-based animus. *Id.* at 282-83. Using similar reasoning to the "stray remarks" doctrine of *Price Waterhouse*, the Fourth Circuit rightly concluded that the safety inspector's bias could not be attributed to the employer. *Id.* at 296.

In the third class of cases, where we presently finds ourselves, a biased supervisor without termination authority, reports to someone up the chain of command who possesses termination authority. The Seventh and Tenth Circuits have adopted a causation analysis to determine whether the supervisor's bias may be imputed to the employer, but, as discussed above, this analysis is misplaced.

The approach more faithful to Title VII is to follow the Court's analysis in *Reeves* and look to the independence of the formal decisionmaker's action. In *Reeves*, Ms. Sanderson was the formal decisionmaker who fired Mr. Reeves, but evidence presented by Mr. Reeves showed Mr. Chesnut also to be a decisionmaker. *Reeves*, 530 U.S. at 152. The Court implicitly determined that Ms. Sanderson did not act independently but rather acted *inter*dependently with Mr. Chesnut. *Id.* Once the Court was satisfied that Mr. Chesnut was a decisionmaker, it followed that his animus could be imputed to the employer.

The approach SHRM advocates here does not require a determination of who the principal decisionmaker is, for there may be several decisionmakers who all played an equal role throughout the chain of command. SHRM proposes that the court identify the individual or the group of individuals who acted as the decisionmakers. Because the formal decisionmaker will always be included in this class, the most practical approach is to look to facts not in dispute to show that the formal decisionmaker made an independent decision. If the formal decisionmaker acted independently, then only her animus may be attributed to the employer. However, if the formal decisionmaker did not make an independent decision, at least one other employee is necessarily part of an interdependent decision, and that person's animus may be imputed to the employer.

To determine independence at the summary judgment stage, courts may look to several undisputed facts in the record. For example, the fact that the formal decisionmaker conducted an inquiry as defined below would always be sufficient to show the independence of the formal decisionmaker. However, an inquiry is not always necessary. Factual situations vary widely and the law should permit human resource managers the flexibility to deal with cases in the most efficient and appropriate method. In these cases, courts

should defer to the business judgment and experience of human resource professionals.

A. The Formal Decisionmaker May Demonstrate Its Independence By Conducting An Inquiry

The effect of the Tenth Circuit's holding in *BCI Coca-Cola* is that a defendant cannot prevail on summary judgment unless it conducted an investigation that was "adequate" as a matter of law. In the court's view, an adequate investigation must consist, at a minimum, of asking the employee for his side of the story. *BCI Coca-Cola*, 450 F.3d at 488, 492. Because Ms. Edgar did not directly ask Mr. Peters his side of the story prior to his termination (although she did indirectly through Mr. Grado, *id.* at 492), the Tenth Circuit held that BCI Coca-Cola did not conduct an adequate investigation and the court reversed the district court's grant of summary judgment. The Tenth Circuit's holding is wrong for two reasons.

First, the Tenth Circuit's "adequate investigation" standard is overbroad. It erroneously imposes a strict legal standard for a fact question best left to the discretion of human resource professionals. If the Tenth Circuit's holding is left undisturbed, human resource professionals will not have the flexibility to apply their business judgment and experience to unique factual situations. In addition, permitting a determination of an investigation's "adequacy" amounts to judicial second guessing. Moreover, although an inquiry is sufficient to establish a formal decisionmaker's independence, in some circumstances, no inquiry is needed.

A human resource professional's decision whether to perform an inquiry is precisely the discretion protected by the super-personnel doctrine. In *Pippin v. Burlington Resources Oil and Gas Co.*, the Tenth Circuit held that it "will not second guess business decisions made by employers, in the absence of some evidence of impermissible motives." 440 F.3d 1186, 1197 (10th Cir. 1988) (quoting *Branson v. Price River*

Coal Co., 853 F.2d 768, 772 (10th Cir. 1988)). Similarly, in *Bender v. Hecht's Department Stores*, the Sixth Circuit held that it was improper for a court to act "as a super personnel department, overseeing and second guessing employers' business decisions." 455 F.3d 612, 627-28 (6th Cir. 2006) (internal quotations omitted). The Eighth Circuit opined in *Stallings v. Hussman Corp.* that "we are mindful that we do not sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination." 447 F.3d 1041, 1052 (8th Cir. 2006). Similarly, in *Millbrook v. IBP, Inc.*, the Seventh Circuit explained that "a court's role is to prevent unlawful hiring practices, not to act as a super personnel department that second-guesses employers' business judgments." 280 F.3d 1169, 1181 (7th Cir. 2002) (internal quotations omitted).

The super-personnel doctrine derives from the well-established business judgment rule, which this Court has recognized. *E.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 101 (1991); *NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 520 (1984); *Burks v. Lasker*, 441 U.S. 471, 474 (1979). The requirement of performing an adequate investigation imposes an inefficient and undue burden on employers, and it unnecessarily forces a process upon them in instances when they, as experts, may determine that a different solution is preferable.

The Tenth Circuit conceptualized a flawed definition of "investigation." A more precise test would allow a formal decisionmaker to conduct an *inquiry*, which is the minimum necessary for establishing that she arrived at her decision independently. SHRM proposes that this "inquiry" be defined as any active search for and discovery of evidence probative of the reliability of the supervisor's report or stated grounds for an adverse employment action.

If the formal decisionmaker makes such an inquiry, then she has established that she independently made her decision,

and the supervisor's animus is not imputed to the employer. This standard is consistent with the super personnel doctrine's deference to business judgment because it preserves an employer's discretion in tailoring its inquiry according to the unique facts presented.

BCI conducted such an inquiry. After Mr. Grado conferred with Ms. Edgar of the Human Resource Department concerning Peters' plans to call in sick, Ms. Edgar and Ms. Pederson did several things that rise to the level of an inquiry. First, Ms. Edgar advised Mr. Grado to "find out what the situation was and, unless Mr. Peters had a compelling reason why he could not come to work, to order Mr. Peters to work on Sunday." *BCI Coca-Cola*, 450 F.3d at 492 (internal quotations omitted). Mr. Grado followed Ms. Edgar's advice and reported back to Ms. Edgar "exactly what had happened" when Mr. Grado spoke to Mr. Peters. *Id.* at 479-80. Indeed, it was Ms. Edgar who decided that Mr. Peters' behavior amounted to insubordination. *Id.* at 480.

The following Monday morning Ms. Edgar held several telephone conferences with both Mr. Grado and Ms. Pederson to discuss Mr. Peters' conduct. Next, at Ms. Edgar's direction, Ms. Pederson pulled Mr. Peters' file and found evidence of a 1999 incident in which Mr. Peters received a suspension and a "final warning" for insubordination from a different supervisor. *Id.* In the 1999 incident, Mr. Peters was ordered to work on Sunday; he refused and, according to the file, "was rude and unprofessional in his conduct." *Id.* (internal quotations omitted). Only after obtaining Mr. Peters' side of the story and finding evidence of the 1999 incident for which Mr. Peters was issued a final warning did Ms. Edgar decide to terminate Mr. Peters for insubordination. *Id.* These facts demonstrate that Ms. Edgar conducted an "inquiry"—she actively searched for and found evidence probative of the reliability of Mr. Grado's updates on his dealings with Mr. Peters.

In taking these steps, BCI Coca-Cola did what SHRM believes many non-discriminatory employers would have done in the absence of reasons know that Mr. Grado may have harbored a bias. While SHRM concedes that in some circumstances further inquiry may be preferable, there is no foundation in Title VII jurisprudence to mandate a specific process. To specifically require an "adequate investigation," including asking the employee his side of the story, would be to impose an unprecedented procedural requirement on private employers. An employee's right to be asked his version of events and the right to the benefits of an "adequate investigation" are rights enjoyed by public employees who are entitled to notice and a hearing prior to adverse action. In the private sector, unionized employees enjoy similar rights, but these are rights that an employee must specifically bargain for. The Tenth Circuit's holding implicitly establishes the right to be heard for all private employees. Such rights are unfounded in Title VII.

It should be noted that the Tenth Circuit misapplied its own "adequate investigation" standard. The Tenth Circuit recognized that Ms. Edgar instructed Mr. Grado to "find out what the situation was" and to talk to Mr. Peters and determine why he wouldn't be able to work on Sunday. *Id.* at 479. Ms. Edgar, through Mr. Grado, did ask Mr. Peters to explain his position, and the Tenth Circuit's conclusion that she "failed to take even the basic step . . . of asking Mr. Peters for his side of the story" is factually incorrect. *Id.* at 491.

B. The Tenth Circuit Overlooks Numerous Other Ways In Which Independence May Be Demonstrated

The collective experience of the human resources community teaches that an inquiry, while always sufficient to show independence, is not always necessary. Rather, human resource professionals need the flexibility and latitude to handle employment decisions in the most efficient and responsible manner under the circumstances. Often times, an inquiry

will not be the best way to establish the formal decisionmaker's independence.

1. Termination By The Formal Decisionmaker Pursuant to a Policy of Automatic Termination (e.g., a Zero-Tolerance Policy)

Some facts leading to an adverse employment decision are so apparent that no inquiry is required by the formal decisionmaker before taking the contemplated action. For example, a company may have a zero-tolerance drug policy in place and requires routine testing pursuant to a written policy. If the supervisor receives the lab results showing that the employee tested positive and forwards the results to the formal decisionmaker who promptly terminates the employee, no claim should lie against the employer even if the supervisor harbored race-based animus. The employer's decision was based entirely on the facts of the zero-tolerance drug policy and the positive test results. Under these circumstances, the supervisor's forwarding of the test results could hardly be said to compromise the independence of the formal decisionmaker's action.

In addition to policies of automatic termination, SHRM's experience is that, in the field of occupational safety and health, a formal decisionmaker may decide immediately to terminate an employee for a safety infraction. In such cases, the formal decisionmaker should be given the latitude to do so without inquiry—even if the decision is based entirely on a supervisor's report –if in doing so the formal decisionmaker acted in good faith furtherance of the safe and healthful conditions of the workplace.

Yet, the Tenth Circuit would require the employer to ask the employee his or her side of the story before taking any adverse action lest the employee later brings forth evidence that the supervisor was biased. Under the Tenth and Seventh Circuits' framework, the supervisor's animus would be imputed to the employer because (1) the supervisor's forward-

ing of a report was a cause of the termination, and (2) the employer did not conduct an "adequate investigation" that included asking the employee his or her side of the story. *BCI Coca-Cola*, 450 F.3d at 492. SHRM believes that in these situations, an inquiry is wholly unnecessary to the particular decision facing the employer and to conduct one would be a gross waste of corporate resources.

Lockheed Martin and *BCI Coca-Cola* are examples of this situation. In *Lockheed Martin*, Ms. Hill did not dispute the basis for any of the three reprimands issued to her by the "lead person" (Ms. Hill's direct supervisor). *Lockheed Martin*, 354 F.3d at 283. Of the three reprimands, one included a suspension. *Id.* at 282. Company policy provided that "an employee who receives a combination of two reprimands not involving a suspension and one involving a suspension . . . will be subject to discharge." *Id.* Upon issuing Ms. Hill her third reprimand, Mr. Dixon, the lead person, contacted the human resources department and inquired how to proceed under the automatic termination policy. *Id.* Mr. Dixon was told to follow company policy, which he did by forwarding Ms. Hill's disciplinary paperwork to his own supervisors who made the decision to terminate Ms. Hill. *Id.* Under these facts, in which the formal decisionmakers were acting pursuant to a policy of automatic termination, a thorough investigation was not necessary. However, Mr. Dixon's supervisors—the formal decisionmakers—did conduct an inquiry inasmuch as they reviewed Ms. Hill's file. This satisfied the court that they arrived at their decision independently.

Similarly, in the instant case, Mr. Peters was fired pursuant to a stated policy of automatic termination. Ms. Edgar instructed Mr. Grado to inform Mr. Peters that absent a compelling reason why he could not work on Sunday, Mr. Peters' refusal to work would be insubordination, which could result in termination. *BCI Coca-Cola*, 450 F.3d at 479. When Mr. Grado relayed to Ms. Edgar the contents of his Friday conversation with Mr. Peters, Ms. Edgar "determined at that time

that Mr. Peters' conduct in that conversation, standing alone, amounted to insubordination warranting termination." *Id.* at 480. Later, Ms. Pederson discovered that Mr. Peters' file contained a 1999 suspension and "final warning" for insubordination under strikingly similar circumstances. *Id.* A "final warning" is tantamount to a policy of automatic termination. In light of the facts of Mr. Peters' insubordination on the phone call with Mr. Grado and the 1999 final warning for insubordination, Ms. Edgar independently decided to file Mr. Peters. *Id.*

SHRM notes that the steps Ms. Edgar took reflect the realities of the workplace. In the absence of any reason to suspect Mr. Grado of bias, Ms. Edgar asked Mr. Grado additional questions, directed him to gather additional information, reviewed Mr. Peters' file, and made a decision to terminate Mr. Peters. Human resource professionals at larger employers cannot conduct full investigations for each termination.

2. *The Supervisor Does Not Advocate For a Particular Decision But Merely Reports Facts To or Seeks Advice From the Formal Decisionmaker*

The Court should look to the strength of the subordinate supervisor's advocacy as an indicator of whether the supervisor's behavior tends to make him or her one of several interdependent decisionmakers. In cases in which the supervisor in effect becomes an advocate for a particular decision and seeks to influence the formal decisionmaker, the court may need to look further for facts relating to the formal decisionmaker's independence. However, where a supervisor merely reports facts or seeks advice from the formal decisionmaker, an inquiry is unnecessary. The supervisor's only role in this scenario is to convey or receive information, not to influence the formal decisionmaker. Thus, there is no threat to the independence of the formal decisionmaker's actions.

In the leading cases in which the employee subordinate to the formal decisionmaker strongly advocated for the adverse employment decision, the reviewing court denied summary judgment for the employer. In *Reeves*, "Chesnut, along with Dana Jester, vice president of human resources, and Tom Whitaker, vice president of operations, recommended to company president Sanderson that petitioner and Caldwell be fired." 530 U.S. at 138. In *McKinney*, Mr. Ciulla, the subordinate employee, gave Ms. Jacobsen, the formal decisionmaker, "an ultimatum . . . that he would quit if Russell were not fired." 235 F.3d at 224. In *Shager*, "Lehnst recommended to Asgrow's 'Career Path Committee,' which reviews personnel action, that Shager be fired; and in July 1986, he was." 913 F.2d at 400.

In the lone case in which the subordinate employee did not advocate for a particular result but merely presented facts to the human resource department, the Fourth Circuit affirmed summary judgment for the employer. *Lockheed Martin*, 354 F.3d at 297. In *Lockheed Martin*, after Ms. Hill received her third reprimand which, under company policy, required automatic termination, her supervisor, Mr. Dixon, contacted his own supervisor, Mr. Griffin, to apprise him of the situation and "to obtain guidance on how to proceed." *Lockheed Martin*, 354 F.3d at 282. Mr. Griffin instructed Mr. Dixon to proceed under company policy, which required forwarding Ms. Hill's disciplinary paperwork to Mr. Griffin who, along with Mr. Prickett, made the decision to terminate Ms. Hill. *Id.* At no time did Mr. Dixon suggest or recommend to his superiors that Ms. Hill be terminated; rather, as the opinion makes clear, his contact with Mr. Griffin was limited to obtaining guidance on how to deal with a delicate employment matter.

In the instant case, Mr. Grado never advocated or suggested to Ms. Edgar or Ms. Pederson that Mr. Peters be terminated. In fact, the Tenth Circuit recognized that after Mr. Grado grew frustrated by Mr. Peters' refusal to work on

Sunday, Mr. Grado "decided to *seek advice* from the Human Resources Department." *BCI Coca-Cola*, 450 F.3d at 479 (emphasis added). Throughout his several conversations with Ms. Edgar, Mr. Grado merely recounted his dealings with Mr. Peters as he carried out Ms. Edgar's instructions, and he continually asked for advice on how to proceed in the matter. *Id.* at 479-80. At every step in the process that led to Mr. Peters' termination, Ms. Edgar was the sole decision-maker. She instructed Mr. Grado to inform Mr. Peters that his failure to work on Sunday without a compelling excuse was ground for termination; she concluded that Mr. Peters' remark to Mr. Grado during their Friday telephone call ("Do what you got to do and I'll do what I got to do") was insubordinate; and she decided that Mr. Peters should be terminated. *Id.* at 479-81. Mr. Grado's role in the process was merely ministerial, and it cannot be said to have compromised Ms. Edgar's independent decision to terminate Mr. Peters. The Tenth Circuit is therefore incorrect that "[Ms. Edgar's] investigation consisted of exactly one action: directing Ms. Pederson to pull Mr. Peters' personnel file." *Id.* at 492.

SHRM's approach yields results similar to those reached by the circuit courts, but it does so in a way that is faithful both to Title VII's intent requirement and the Court's holding in *Reeves*. The factors SHRM highlights as important for consideration in subordinate liability cases are the same factors that implicitly led the circuit courts to their decisions. An analysis of independent decisionmaking will answer the ultimate question of whether a subordinate supervisor's bias is attributable to the employer.

CONCLUSION

The decision of the Court of Appeals for the Tenth Circuit should be reversed, and the district court's grant of summary judgment for BCI Coca-Cola should be reinstated.

Respectfully submitted.

MICHAEL P. AITKEN
KENYA N. WILEY
SOCIETY FOR HUMAN
RESOURCE MANAGEMENT
1800 DUKE STREET
ALEXANDRIA, VIRGINIA
22314
(703) 535-5026

MANESH K. RATH
Counsel of Record
ROBERT A. SHEFFIELD
PETER DE LA CRUZ
MELISSA A. D'AMBROSE
KELLER AND HECKMAN LLP
1001 G STREET, N.W.,
SUITE 500 WEST
WASHINGTON, D.C. 20001
(202) 434-4182

COUNSEL FOR *AMICUS CURIAE*
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

FEBRUARY 20, 2007